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IN THE
Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,
v.
Norwegian Cruise Line Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and to what extent Title III of the Americans with Disabilities Act applies to companies that operate foreign-flag cruise ships in United States waters?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Julia Hollenbeck, David T. Killough, Rodger Peters, and Ana Spector.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Douglas Spector, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-15a) is published at 356 F.3d 641. The district court's memorandum and order granting in part and denying in part respondent's motion to dismiss (Pet. App. 16a-47a), dated September 9, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2004. The court of appeals denied rehearing en banc on February 10, 2004. See Pet. App. 48a-49a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix at 50a-74a.

STATEMENT

This is a case under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.* Petitioners allege that respondent cruise line violated Title III by discriminating in the prices, access to public accommodations, and services offered to passengers with disabilities and their companions. Acknowledging that its decision squarely conflicted with the Eleventh Circuit, the Fifth Circuit held that petitioners could not pursue their claims because Title III does not apply to foreign-flag cruise ships and their operators.

1. The ADA establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The provisions of Title III, in particular, are "'a milestone on the

path to a more decent, tolerant, progressive society.'" *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001) (quoting *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a) (emphasis added). Title III also bars discrimination "on the basis of disability in the full and equal enjoyment of *specified public transportation services* provided by a private entity that is primarily engaged in the business of transporting people" between states or between the United States and a foreign country. *Id.* §§ 12184(a), 12181(1)(A)-(B) (emphasis added).

The statute further defines these general prohibitions of discrimination with a series of more specific rules, at least three of which are relevant here. First, Title III requires a place of public accommodation to provide individuals with disabilities with an "opportunity to participate in or benefit from" its "good[s], service[s], facilit[ies], privilege[s], advantage[s], or accommodation[s]" equal to that which it provides to individuals without disabilities. 42 U.S.C. 12182(b)(1)(A)(ii). Second, with respect to physical barriers to access, the statute requires the place of public accommodation or the specified public transportation service to remove them "where such removal is readily achievable." *Id.* § 12182(b)(2)(A)(iv). Third, the statute forbids discrimination in public accommodations against individuals "because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." *Id.* § 12182(b)(1)(E).

Pursuant to a specific grant of statutory authority, 42 U.S.C. 12186, the Department of Justice (DOJ) and the Department of Transportation (DOT) have issued regulations clarifying the statutory definitions of "public accommodation" and "specified public transportation." These regulations define public accommodation to embrace any privately operated "facility" – including "rolling stock or other conveyances" – that contains, for example, a "place of lodging," "restaurant," or "place of exercise or recreation." 28 C.F.R. 36.104. The DOJ interprets this language to encompass "places of public accommodation operated in mobile facilities (*such as cruise ships*, floating restaurants, or mobile health units)." 28 C.F.R. pt. 36, App. B (emphasis added). Similarly, the DOT has stated unequivocally that "[c]ruise ships easily meet the definition of 'specified public transportation' * * * [because they] are used almost exclusively for transporting passengers * * *, [they] operate according to set schedules or for charter, and their services are offered to the general public * * * on a regular and continuing basis." 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991); see also 42 U.S.C. 12181(10) (defining "specified public transportation").

2. Respondent Norwegian Cruise Line Ltd. is a multi-billion-dollar Bermuda corporation whose principal place of business is Miami, Florida. Resp. C.A. Br. 4; Pet. App. 16a. It operates cruise ships under the Bahamian flag that depart from United States ports. Pet. App. 16a.

Petitioners consist of two groups of individuals. The first group is persons with disabilities who traveled on respondent's cruise ships that departed from and returned to the Port of Houston, Texas in September 1998, August 1999, and September 1999. Amended Compl. ¶¶ 13, 15, 17. The second group is the companion petitioners: individuals who accompanied the petitioners with disabilities. All of the petitioners intend to take future cruises on respondent's ships. *Id.* ¶ 37.

The petitioners with disabilities have mobility impairments that substantially interfere with the major life activity of walking and that require them to use wheelchairs or motorized scooters. Amended Compl. ¶ 6. They allege that respondent denied them the equal benefit and enjoyment of its facilities by discriminating against them on account of their disabilities.

In particular, *before even boarding a cruise ship*, the petitioners with disabilities were subjected to discrimination because respondent required them to pay higher fares and other surcharges to use one of the approximately four cabins considered accessible to mobility-impaired passengers.[1] Amended Compl. ¶ 17. Subsequently, upon boarding each ship, the petitioners with disabilities encountered architectural barriers that prevented them from enjoying many of the ship's services, programs, and benefits, such as public restrooms, restaurants, swimming pools, and elevators. *Ibid.*; Pet. App. 2a. In addition, respondent failed to create or maintain an emergency evacuation procedure for these petitioners. Indeed, although emergency evacuations take place on a deck that is completely inaccessible to petitioners with disabilities, respondent never informed them how they would be evacuated in the event of an emergency. Amended Compl. ¶ 19.

The companion petitioners allege that respondent denied them the equal benefit and enjoyment of its facilities by discriminating against them on account of their association with the petitioners with disabilities. First, before boarding the ship, these petitioners were also required to pay the higher fares for accessible (albeit less desirable) cabins on respondent's cruise ships, Amended Compl. ¶¶ 16, 18, as respondent requires its passengers with disabilities to travel with a companion, even if they are self-reliant. Pet. C.A. Br. at 5 n.2, 6. Second, while on the ship, these companion

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[1] Petitioners traveled on either the Norwegian Star, which has approximately 800 cabins, or the Norwegian Sea, which can carry approximately 1500-1800 passengers. Amended Compl. ¶¶ 14, 16. None of the approximately four accessible cabins on each ship has a balcony or a window. Pet. C.A. Br. 6.

petitioners often were forced to miss programs, services, and activities that occurred in inaccessible locations because respondent expressly prohibited them from leaving their companions with disabilities alone. Amended Compl. ¶ 18; Pet. Dist. Ct. Br. 2 n.1, 20 n.19.

3. In 2000, petitioners filed this putative class action in the U.S. District Court for the Southern District of Texas. Petitioners sought declaratory and injunctive relief under Title III of the ADA to remedy respondent's widespread discriminatory practices.

Respondent moved to dismiss the complaint for failure to state a claim. Petitioners, joined by the United States as *amicus curiae*, opposed the motion.

The district court granted respondent's motion with respect to petitioners' claims that sought removal of physical barriers on the ships. Although the general statutory requirement of "readily achievable" barrier removal in existing facilities is self-executing, see 42 U.S.C. 12182(b)(2)(A)(iv), the court found it critical that the DOJ and DOT had not yet issued cruise ship-specific Title III regulations regarding *new construction* and *alterations*. Because those regulations had not been promulgated, the district court held that separate claims relating to the barrier removal issues were precluded. Pet. App. 42a.

The district court otherwise rejected respondent's motion to dismiss. The district court specifically held that the petitioners with disabilities had stated a claim with respect to the cruise line's pricing policies and its denial of access to various services and activities onboard its ships. Pet. App. 28a. The district court further held that the companion petitioners had stated a cognizable claim with regard to their allegations of associational discrimination. *Id.* 47a.

In reaching these holdings, the district court held that Title III of the ADA applies to foreign-flag cruise ships and their operating companies, agreeing with petitioners and the United States. Cruise ships, the district court explained, fit within the definitions of both "public accommodation" and "specified public transportation." Pet. App. 23a, 25a. The district court relied, in particular, on similar rulings of the Eleventh Circuit, see *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (CA11 2002), and another district court, see *Deck* v. *American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999), *dismissed on other grounds*, 121 F. Supp. 2d 1292 (D. Haw. 2000). The district court also explained that the DOT's and DOJ's conclusions that Title III applies to cruise ships supported its decision. See Pet. App. 23a-25a; 28 C.F.R. pt. 36, App. B (DOJ); 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (DOT).

The district court also rejected respondent's claim that it is exempt from Title III because it operates foreign-flag ships. The district court recognized that the relevant conduct occurred solely within the "geographic boundaries of the United States." Pet. App. 31a. Relying on the Eleventh Circuit's conclusion that "a foreign-flag ship sailing in United States waters is not extraterritorial," *Stevens*, 215 F.3d at 1242, the district court thus held the presumption against extraterritorial application of federal law to be inapposite, Pet. App. 35a.

The court further held that the separate presumption against the application of federal law to foreign-flag ships is limited to laws governing "the internal affairs of the ship," whereas petitioners' claims involve only the relationship between a "foreign-flagged ship and its fare-paying American passengers." Pet. App. 35a. The district court thus expressly agreed with the Eleventh Circuit's holding that the presumption is confined to instances in which "application of American law would interfere with the relations between the ship's foreign owner and the ship's foreign crew." *Stevens*, 215 F.3d at 1242.

Furthermore, although ultimately concluding that the lack of regulations governing new construction and alteration made the barrier removal requirements unenforceable, Pet. App. 42a, the district court disagreed with respondent's threshold argument that Title III's requirements for structural barrier removal conflicted with the United States' commitments under the International Convention for the Safety of Life at Sea, 32 U.S.T. 47 (1974) (SOLAS). The court noted that any requests for barrier removal that would conflict with the requirements of SOLAS likely would not be "readily achievable," and thus would not be required. Pet. App. 27a. Consistent with the Eleventh Circuit, see *Stevens*, 284 F.3d at 1188, the district court also concluded that dismissal of petitioners' claims based on a "possibility" of a conflict with SOLAS was inappropriate when deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 26a.

4. Both sides appealed. Petitioners challenged the district court's dismissal of their claims seeking the removal of physical barriers aboard the cruise ships. Respondent challenged the district court's holding that Title III applied to its foreign-flag ships. The Fifth Circuit accepted the district court's certification of its decision for interlocutory appeal and held that petitioners' Title III claims were barred outright.

As an initial matter, the court of appeals assumed, without deciding, that Title III generally applies to cruise ships and the companies that operate them. Pet. App. 4a n.3.

Disagreeing with the United States' position as *amicus curiae* supporting petitioners, and acknowledging that its conclusion conflicted with the Eleventh Circuit's decision in *Stevens*, the Fifth Circuit held that Title III does not protect petitioners from discrimination by foreign-flag carriers. The court of appeals recognized that "arguments can be made both ways" concerning the applicability of Title III to foreign-flag ships and their operators. Pet. App. 4a. Nonetheless, the court below primarily rested its decision on two presumptions: the presumption against application of federal law to foreign-flag ships and the presumption against extraterritoriality.

First, the Fifth Circuit interpreted *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), to "prohibit United States courts from applying domestic statutes to foreign-flagged ships without specific evidence of congressional intent," which the court of appeals determined to be lacking in the wording of Title III. Pet. App. 7a-8a. In so holding, the court specifically deemed the Eleventh Circuit's decision in *Stevens* – which distinguished *Benz* and *McCulloch* as implicating only "the 'internal management and affairs' of a foreign-flag ship," 215 F.3d at 1242 – "unpersuasive": "[T]he plaintiffs' proposed accommodations * * * would require [respondent] to adjust evacuation procedures and responsibilities of the crew, and would mandate structural changes to the ships. Thus, it is incorrect to suggest, as *Stevens* does, that such modifications do not involve the 'internal management and affairs' of the ship merely because they were requested by a passenger rather than an employee." Pet. App. 13a.

The Fifth Circuit found related support for its conclusion in the principle that "an act of Congress 'ought never to be construed to violate the law of nations, if any other possible construction remains[.]'" Pet. App. 8a (quoting *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). The court explained that "the Title III barrier removal provisions may govern the finest details of maritime architecture in the quest to render ships fully accessible to disabled passengers," thereby "pos[ing] a stark likelihood of conflicts with the standards set out in" SOLAS. *Id.* 9a. "Therefore, as a matter of statutory construction, Title III must be narrowly construed in a manner that avoids these potential conflicts." *Ibid.*

Second, the Fifth Circuit determined that petitioners could not overcome the general presumption against the extraterritorial application of U.S. law. Petitioners sought to apply Title III extraterritorially, the court reasoned, because "many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters." Pet. App. 11a. The Fifth Circuit then relied on *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244 (1991), to conclude that Title III failed the "clear-statement requirement to gauge the extraterritorial application of statutes." Pet. App. 8a.

Finally, the Fifth Circuit declined to accord *Chevron* deference to the view of the DOJ and DOT that Title III applies to foreign-flag cruise ships. The government, according to the court of appeals, had issued mere "informal administrative opinions." Pet. App. 13a (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). Moreover, the court found, the DOJ and DOT opinions lacked the "power to persuade" that would entitle them to "respect." *Id.* 14a (quoting *Christensen*, 529 U.S. at 587, and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

5. The full Fifth Circuit denied a petition for rehearing en banc. Pet. App. 48a-49a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are Divided Over the Question Presented.

As the Fifth Circuit itself repeatedly acknowledged, the decision below squarely conflicts with the Eleventh Circuit. In *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (2002), the Eleventh Circuit held that Title III applies both to cruise ships generally and to foreign-flag cruise ships in particular. By contrast, the Fifth Circuit – which assumed without deciding that Title III applies to cruise ships generally – held that Title III does not extend to foreign-flag cruise ships and their operating companies. Pet. App. 14a-15a.

In *Stevens*, the Eleventh Circuit considered a claim that the inaccessibility of a Bahamian-flag cruise ship to persons who use wheelchairs violated Title III. The court concluded that Title III applies to many features of cruise ships. The court began by determining that areas of a cruise ship – such as "places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift [shops], gymnasiums, and health spas" – qualify as "public accommodations." *Stevens*, 215 F.3d at 1241. Because "a restaurant aboard a ship is still a restaurant," and because "Congress made no distinctions * * * based on the physical location of the public accommodation," the Eleventh Circuit reasoned that "those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for the purposes of Title III." *Ibid.*

The Eleventh Circuit then considered, but ultimately rejected, two separate presumptions on which the appellant cruise ship sought to rely: the presumption against the extraterritorial application of U.S. law and the presumption against applying U.S. law to the "internal management and affairs" of foreign-flag carriers. *Stevens*, 215 F.3d at 1242. First, the court concluded, "[t]he presumption against extraterritoriality * * * is inapposite" because foreign-flag cruise ships do not constitute foreign territory when they are "sailing in United States waters." *Ibid.* Second, the court held that the presumption against applying U.S. law to the internal affairs of foreign-flag ships was similarly unavailing because the case before it involved "disabled, fare-paying, American passenger[s]" aboard ships that "sail[] in American waters" and thus did not implicate the "internal management and affairs" of the ship. *Ibid.*

In its opinion accompanying the denial of rehearing and rehearing en banc, the panel further concluded that the possibility of a conflict between Title III and SOLAS did not affect the plaintiff's claims. The court of appeals reasoned that in the absence of a demonstrable conflict between the

plaintiff's claims and SOLAS, it would be inappropriate to dismiss the suit. *Stevens*, 284 F.3d at 1188.

As detailed above, see *supra* at 6-9, with respect to each of the three significant points of contention regarding the application of Title III to foreign-flag ships and their parent companies – the presumption against the extraterritorial application of U.S. law, the presumption against the application of U.S. law to the internal affairs of foreign-flag ships, and the implications of SOLAS's safety provisions – the Fifth and Eleventh Circuits reached directly conflicting conclusions of law and, as a result, are divided with regard to the question presented. In contrast to the *Stevens* court's determination that neither the general presumption against the extraterritorial application of U.S. law nor the more specific presumption against applying U.S. law to foreign-flag ships applied to Title III claims by cruise-ship passengers, the Fifth Circuit determined that both presumptions weighed against applying Title III to respondent's ships. Moreover, the Fifth Circuit's decision to construe Title III narrowly to avoid the "stark likelihood of conflicts" with SOLAS, Pet. App. 9a, cannot be reconciled with the Eleventh Circuit's decision.

This case is an ideal vehicle to decide whether Title III applies to foreign-flag cruise ships and their operating companies. The issue was squarely presented and preserved below, and the viability of petitioners' claims depends on its answer.

The Amended Complaint includes a variety of claims under Title III, ranging from discrimination in pricing, to denial of access to various services, to failure to remove physical barriers, and to associational discrimination. This case, therefore, enables this Court to consider the application of Title III in a comprehensive manner.

Moreover, this case presents the opportunity to determine whether Title III applies to the on-land conduct of companies that operate foreign-flag ships. The Fifth Circuit held that those companies are entirely exempt from Title III, even though they maintain offices and sell tickets on United States soil.[2] However, because foreign companies are routinely required to adhere to state and federal laws when the conduct at issue has taken place within the United States, petitioners' pricing claims should remain viable even if Title III does not apply to respondent's foreign-flag ships. This case therefore presents an ideal vehicle not only to resolve the extent of the applicability of Title III to foreign-flag ships, but it also allows this Court to determine whether the cruise companies themselves are bound by Title III when operating on U.S. soil.

II. The Circuit Conflict is Untenable Given the Importance of the Question Presented.

This is no mere conflict between two circuits. The Fifth and Eleventh Circuits have jurisdiction over the ports from which nearly two-thirds of all United States cruises depart.[3] Moreover, fully eighty-five percent of cruises depart from ports within the Fifth, the Eleventh, and the Ninth Circuits, where a district court has held that the ADA applies to cruise ships. See *Deck* v. *American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057, 1061 (D. Haw. 1999), *dismissed on other grounds*, 121 F. Supp. 2d 1292 (D. Haw. 2000). As a result, this conflict renders uncertain the rights of millions of travelers with disabilities. The importance of the uniform application of federal law and the peculiar nature of the cruise industry combine to render the circuit conflict untenable. This Court's intervention is required to resolve this conflict.

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[2] By the Fifth Circuit's logic – which exempts all activity of a company that operates foreign-flag ships from the requirements of Title III – the respondent's new U.S.-flag ships ought similarly to be exempt from Title III, notwithstanding respondent's own concession that U.S. laws apply on those ships. See Kelly Yamanouchi, *Cruising into a New Era*, Honolulu Advertiser, Sept. 7, 2003, at 1F (respondent implying that it will have to comply with U.S. labor laws on its U.S.-flag ships).

[3] Statistics were compiled from data received from the Office of Statistical and Economic Analysis, United States Maritime Administration (MARAD). MARAD's data accounts for the top ten cruise lines, which comprise approximately ninety-five percent of cruises departing from the United States.

Since 1990, nearly *all* cruise ships departing from United States ports have sailed under foreign flags. When Congress enacted the ADA in 1990, there were only two United States-flag ocean-going cruise ships in operation, in comparison to seventy-five foreign-flag ships. H.R. Rep. No. 102-357, at 2 (1991). Since 2001, *no* cruise ship has flown the United States flag.[4] Iver Peterson, *Leading Passengers to Water*, N.Y. Times, Sept. 28, 2003, § 5, at 8; Rhoda Amon, *Here's the Life: Retire to a Ship, Meals Included*, Newsday, Feb. 23, 2003, at E5. Therefore, if foreign-flag ships are exempt from Title III, the entire industry effectively has license to discriminate against passengers with disabilities.

The importance of the question presented is heightened because it is outcome determinative. Only in those jurisdictions that permit claims based on Title III may cruise passengers who have suffered discrimination on the basis of their disabilities vindicate their rights, as Congress intended. Simply put, in the Eleventh Circuit, cruise passengers have a remedy against disability-based discrimination. In the Fifth Circuit, they do not.

Moreover, because individual cruise ships travel between different circuits, the same foreign-flag ship may be subject to litigation in more than one circuit. While this conflict persists, a passenger who boards a cruise in the Eleventh Circuit may have rights under federal law that are denied to a passenger who boards the very same ship in the Fifth Circuit.

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[4] Respondent intends to introduce at least one new U.S.-flag cruise ship and to re-flag several foreign-flag ships with the United States flag over the next several years. Iver Peterson, *Leading Passengers to Water*, N.Y. Times, Sept. 28, 2003, § 5, at 8. However, only one of these ships will be operating in the near future. (Respondent's "Pride of Aloha" goes into operation in June 2004.) The remainder of the ships will be phased in over the course of several years. *Ibid.* Furthermore, these ships will cruise exclusively out of Hawaiian ports, which constitute a very small percentage of United States cruise departures.

This situation is exacerbated by cruise lines' regular practice of using forum selection clauses in their contracts. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593 (1991) (holding that a non-negotiated forum selection clause is reasonable at least in part because cruise lines, which typically carry passengers from different locales, have a "special interest in limiting the fora in which [they] potentially could be subject to suit"). Despite the fact that more than half of United States cruise passengers depart from ports located in the Eleventh Circuit, a cruise line could select a jurisdiction in the Fifth Circuit as the appropriate forum. In that situation, Title III would not apply to a passenger from the Eleventh Circuit who departs from, and returns to, a port in the Eleventh Circuit, even though the Eleventh Circuit has held that Title III applies. Thus, if the circuit split is not resolved, the entire cruise line industry could seek to evade the application of Title III even though the industry operates primarily in a circuit in which cruise ships and their operators are subject to that law.

As a result, the current circuit split affects the travel opportunities for millions of Americans with disabilities and their companions. There are forty-nine million Americans with disabilities over the age of five, of whom more than eleven million travel every year. U.S. Census Bureau, *Disability Status: 2000 – Census 2000 Brief*, *available at* http://www.census.gov/hhes/www/disable/disabstat2k/table1.html (last visited Mar. 31, 2004); Lynnley Browning, *From Beaches to Cities, Efforts to Serve Disabled Travelers*, N.Y. Times, Oct. 19, 2003, § 3, at 9. A recent study suggested that many more Americans with disabilities would travel if accommodations were more accessible. *Travelers With Disabilities Could Spend $27 Billion Per Year, Says New Harris Interactive Poll*, Jan. 16, 2003, *available at* http://www.opendoorsnfp.org/_wsn/page15.html (last visited Mar. 31, 2004). Thus, whether Title III applies to foreign-flag cruise ships has significant practical implications for millions of Americans. The importance of the question presented and the untenable nature of the circuit conflict demonstrate that this Court's intervention is necessary to resolve this issue.

III. Title III of the ADA Applies to Foreign-Flag Cruise Ships and Their Operators.

Certiorari is furthermore warranted because the decision below is wrong on the merits. Simply put, the question in this case is whether U.S. citizens enjoy the protection of U.S. law when they contract to take a cruise that originates in a U.S. port and is operated by a company whose principal place of business is the United States. The statutory language, this Court's precedents, and general principles dictate an affirmative answer to that question. The court of appeals' decision to the contrary was erroneous.

1. Cruise ships surely fall within Title III's definitions of a "public accommodation" and "specified public transportation." As the DOT recognized when interpreting the scope of Title III, cruise ships constitute a "hybrid of a [public] transportation service and a public accommodation." 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991). Indeed, the court of appeals did not even question that general proposition. Rather, it failed to heed Congress's broad commitment to confronting discrimination against Americans with disabilities and then erroneously relied on two inapposite canons of statutory construction to exempt foreign-flag cruise ships from the otherwise uncontroversial application of Title III.

2. The Fifth Circuit erred in treating this as a case involving the extraterritorial application of United States law. The relevant conduct occurred entirely within the United States' territorial jurisdiction.

This Court has emphasized that the presumption against the extraterritorial application of U.S. law is implicated only when a party seeks to apply federal law "'beyond places over which the United States has sovereignty or has some measure of legislative control.'" *EEOC* v. *Arabian American Oil Co.*

(ARAMCO), 499 U.S. 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). See also *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that the "presumption against extraterritorial application of federal statutes [is] inapplicable" when "the actionable tort had occurred in American waters"). The Fifth Circuit mistakenly looked to whether Congress intended Title III to apply on the "high seas," Pet. App. 14a (quoting *ARAMCO*, 499 U.S. at 258), whereas petitioners challenge only respondent's discriminatory conduct while selling tickets to United States passengers, while docked in a United States port, and while traveling within the United States' territorial waters[5] – areas that are unquestionably within the United States' sovereign territory.

Though it is true that the impact of any structural changes that respondent might make to its cruise ships could remain once those ships travel beyond the United States' territorial waters, that prospect does not mean, as the Fifth Circuit thought, that Title III would have "extraterritorial application as soon as the cruise ships leave domestic waters." Pet. App. 11a. In *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923), this Court held that while the Volstead Act's prohibitions on alcohol importation and transportation (including the transportation of alcohol into U.S. territorial waters for use outside the U.S.) did not apply outside the United States' territorial waters, *id.* at 123-24, it did apply to foreign-flag vessels within those waters, *id.* at 124. In so holding, the *Cunard* Court held that the fact that enforcement of a statute within the United States may have an effect outside of the United States does not turn such enforcement into an impermissible extraterritorial application of United States

law. *Id.* at 130. See also *Envtl. Defense Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (CADC 1993) (recognizing that "an extraterritorial application of a statute involves the *regulation* of conduct beyond U.S. borders") (emphasis added).

Furthermore, that domestic application of Title III has implications beyond United States territory is purely incidental to the proper, broad construction of Title III that provides Americans with disabilities with comprehensive protection against discrimination in their own country. Because petitioners' claims derive from activities conducted within the United States' sovereign territory, the presumption against extraterritoriality is inapposite.

3. The Fifth Circuit also erred in extending the narrow presumption against applying federal law to foreign-flag ships. This Court has applied that presumption only when the "internal management and affairs" of a foreign-flag ship are at issue. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963). As the Eleventh Circuit correctly recognized, "this presumption has generally been applied where application of American law would interfere with the relations between the ship's foreign owner and the ship's foreign crew." *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1242 (2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (2002).

Thus, in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), this Court refused to apply the Labor Management Relations Act (LMRA), 29 U.S.C. 141 *et seq.*, to a labor dispute between a foreign ship and its foreign crew. The *Benz* Court noted that "[t]he whole background of the [LMRA] is concerned with industrial strife between American employers and employees." 353 U.S. at 143-44. Here, by contrast, the ADA's broad scope encompasses the relationship between respondent and its U.S. passengers who boarded a cruise ship at a United States port. Title III has nothing to do with the internal order of respondent's ships.

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[5] This Court has recognized that the United States' territorial sea extends twelve nautical miles from shore. See *United States* v. *Alaska*, 521 U.S. 1, 8 (1997) (citing Presidential Proclamation No. 5928 (1988), *reprinted in* notes to 43 U.S.C. 1331).

Cf. *Int'l Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 221 (1982) (refusing to invoke the "tradition of restraint in applying the laws of this country to ships of a foreign country" when a boycott "did not aim at altering the terms of employment of foreign crews on foreign-flag vessels * * * [and] did not seek to extend the bill of rights developed for American workers and American employers to foreign seamen and foreign shipowners").

The rationale underlying the presumption against application of federal law to foreign-flag ships is wholly inapposite here. This Court created the presumption to prevent diplomatic problems between the United States and the flag nation resulting from the United States' assertion of jurisdiction over the flag nation's ship. Indeed, the presumption has been applied only amid "highly charged international circumstances," *McCulloch*, 372 U.S. at 21, or "where the possibilities of international discord are so evident and retaliative action so certain," *Benz*, 353 U.S. at 147. By contrast, when the United States is respondent's principal place of business, Amended Compl. ¶ 10, the flag nation has limited involvement in the oversight of its cruise ships,[6] and there is no actual conflict with the law of another nation, the Fifth Circuit's application of the presumption, divorced from its rationale, is unwarranted.[7] Cf. *Int'l Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970) (holding that U.S. law applies to a wage dispute involving U.S. residents employed by foreign-flag ships to work their docks because it "threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law").

4. The Fifth Circuit further erred when it held that Title III's barrier removal provisions present an irreconcilable conflict with the United States' obligations under SOLAS. Citing a federal report by the Passenger Vessel Access Advisory Committee (PVAAC), the court of appeals held that there was a "stark likelihood of conflicts" between the barrier removal provisions and SOLAS, which required it to narrowly construe Title III to avoid the conflicts. Pet. App. 9a (citing PVAAC Report at Chapter 13, Parts I-II, *available at* http://www.access-board.gov/news/pvaac-rept.htm (last visited Mar. 31, 2004)).

For a number of reasons, the court of appeals' conclusion on this point was incorrect. First, any conflict between the Title III regulations and SOLAS is entirely hypothetical and speculative. The PVAAC Report to which the Fifth Circuit referred did not discuss any *current* conflict between SOLAS and Title III; instead, it purported to identify a conflict between SOLAS and a series of *proposed* Title III regulations regarding new construction and alterations of cruise ships. Even so, the PVAAC Report identified only *three* minor conflicts between these proposed regulations and SOLAS. See PVAAC Report at Chapter 13, Parts I-II. For example, the proposed regulations "require[] changes in level greater than ½ [inches] to be ramped." *Ibid.* In contrast, SOLAS simply requires that thresholds be "of ample height and strength" and that doors opening to the weather deck be capable of becoming watertight efficiently. *Ibid.* (citing SOLAS § II-1-20.2).[8] A minor conflict such as this should not prevent Title III from prohibiting other structural barriers on cruise ships or other discriminatory practices that do not involve such barriers.

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[6] William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes On Royal Caribbean Cruise Lines*, 19 Wis. Int'l L.J. 71, 92 (2000) (noting that "flag-states reap great financial benefits from cruise lines and are loathe to give these companies a reason (e.g., strict oversight and enforcement of pollution laws) to find another home"); William Langewiesche, *Anarchy at Sea*, Atlantic Monthly, Sept. 1, 2003, § 2, at 50 (recognizing that most flag nations "have neither the expertise nor the inclination to enforce their own official standards"); Bob Edwards & Elizabeth Arnold, *Alaska's Efforts to Clean Up the Cruise Industry* (National Public Radio broadcast, May 11, 2001) (commenting that cruise companies register their ships in countries "where laws are lax and enforcement is non-existent").

[7] Similarly, in an action under the Jones Act, 46 U.S.C. 688, this Court held that the presumption did not prohibit the application of federal law to an action by a foreign crew member against a foreign-flag ship where the allegedly tortious conduct occurred in United States waters on a ship that was not merely a "casual visitor" to the United States, and where its owner "engaged in extensive business operation in this country." *Hellenic Lines, Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970). The parallels to this case are striking: Petitioners complain of conduct occurring in United States waters on ships that routinely travel to and from United States ports and that are operated by a company whose principal place of business is in the United States.

Second, petitioners can prevail even if SOLAS narrows the relief to which they are entitled. Title III's requirements that *currently* apply to cruise ships are crafted to minimize conflict with statutory obligations. As the district court correctly noted, Title III requires barrier removal only where it is "readily achievable." Pet. App. 27a (quoting 42 U.S.C. 12182(b)(2)(A)(iv)). It is unlikely that barrier removal would be "readily achievable" where it would conflict with SOLAS. Indeed, both the DOT and DOJ have made clear that foreign-flag ships are not subject to domestic law when "there are specific treaty prohibitions that preclude enforcement." Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.), *available at* http://www.ada.ufl.edu /ADAcd/cdpages/HTM_Pubs/TAMAD3UP.HTM (last visited Mar. 31, 2004) (DOJ interpretation). See also 56 Fed. Reg. 45,585, 45,600 (Sept. 6, 1991) (DOT interpretation).

Finally, it is particularly inappropriate for the Fifth Circuit to rely on the possibility of a conflict with SOLAS while deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The question is whether *any* of Title III's barrier removal provisions should apply; if they do, then a district court can determine which provisions are readily achievable.[9] Analyzing that question will not be difficult or time consuming given the few conflicts that may exist with the proposed regulations. Indeed, this analysis will not be substantially different than that which federal district courts perform in every Title III barrier removal case. These limited conflicts do not justify exempting an entire industry from Title III's obligations, thus allowing foreign-flag cruise ships to be the only "public accommodation" or "specified public transportation" on which it is permissible to discriminate against Americans with disabilities while within the United States' territorial boundaries.

5. Not only does Title III reach foreign-flag cruise *ships*, it manifestly reaches the operation of foreign-flag cruise *lines* with respect to their activities on United States land. Yet the Fifth Circuit dismissed petitioners' claims that respondent's on-land pricing policies violate Title III. The Fifth Circuit created an exemption from Title III for cruise *lines* that do business within the United States because those companies operate foreign-flag *ships* and are incorporated in foreign countries. That ruling ignores the fact that petitioners' pricing claims implicate no U.S. treaty obligation nor any presumption against extraterritoriality. The ruling also violates the settled rule that foreign corporations are subject to state and federal laws for conduct in the United States. See, *e.g.*, *Matsushita Elec. Indus. Co. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Int'l Fin. Servs. Corp.* v. *Chromas Tech. Canada, Inc.*, 356 F.3d 731 (CA7 2004); *Clausen* v. *M/V New Carissa*, 339 F.3d 1049 (CA9 2003); *PVI, Inc.* v. *Ratiopharm GmbH*, 253 F.3d 320 (CA8 2001); *Lindahl* v. *Air France*, 930 F.2d 1434 (CA9 1991). Indeed,

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[8] The two other conflicts identified in the PVAAC Report concern the angle of inclination of stairs and the use of elevators as emergency exits. See PVAAC Report at Chapter 13, Parts I-II.

[9] The Fifth Circuit suggested that this Court has refused to engage in individualized review of conflicts between federal laws and the United States' international obligations. Pet. App. 11a (citing *Benz*, *McCulloch*, and *ARAMCO*). In fact, this Court has repeatedly analyzed whether a specific application of the LMRA conflicts with international law or implicates foreign affairs. See, *e.g.*, *Allied Int'l*, 456 U.S. at 218; *Ariadne Shipping*, 397 U.S. at 200.

cruise lines are often parties in suits in which they are subject to federal or state law.[10] The Fifth Circuit's dismissal of petitioners' claims that respondent's pricing policies violate Title III is thus indefensible.

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[10] See, *e.g.*, *Princess Cruises, Inc.* v. *Gen. Elec. Co.*, 143 F.3d 828 (CA4), *cert. denied*, 525 U.S. 982 (1998) (applying Virginia contract law to a contract dispute between a cruise line and a ship repairer); *EEOC* v. *Kloster Cruise Ltd.*, 897 F. Supp. 1422 (S.D. Fla. 1995) (examining whether Kloster Cruise Ltd. violated the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, when it terminated several older, shoreside salespersons); *Latman* v. *Costa Cruise Lines N.V.*, 758 So. 2d 699 (Fla. Dist. Ct. App. 2000), *cert. denied*, 537 U.S. 884 (2002) (subjecting cruise lines, including Kloster Cruise Lines, d/b/a Norwegian Cruise Lines, to Florida's Deceptive and Unfair Trade Practices Act because of the cruise lines' pricing policies). Many of the laws that are the subject of these suits relate to pricing. See, *e.g.*, *Latman*, 758 So. 2d 699; *Premier Cruise Lines, Ltd., Inc.* v. *Picaut*, 746 So. 2d 1132 (Fla. Dist. Ct. App. 1999) (allowing plaintiffs to bring a false and fraudulent advertising claim against a cruise line); *Renaissance Cruises, Inc.* v. *Glassman*, 738 So. 2d 436 (Fla. Dist. Ct. App. 1999) (affirming class certification in a suit alleging deceptive trade practices based on the cruise line's pricing policies).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 02-21154, 03-20056.

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLANTS
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS
NORWEGIAN CRUISE LINE, DEFENDANT-APPELLEE

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLEES
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS
NORWEGIAN CRUISE LINE, DEFENDANT-APPELLANT

Argued and Submitted:
Opinion Filed: Jan. 12, 2004

Appeals from the United States District Court for the Southern District of Texas;
John D. Rainey, District Judge, Presiding, D.C. No. H-00-2649
Before REAVLEY, JONES, AND CLEMENT, Circuit Judges.

OPINION

JONES, Circuit Judge.

This appeal presents the question whether Title III of the Americans with Disabilities Act ("ADA") applies to foreign-flagged cruise ships. *See* 42 U.S.C. § 12182 (2000) *et seq.* As a matter of first impression in this circuit, we hold that it does not. We affirm in part and reverse in part the district court's interlocutory orders that formed the basis of this § 1292(b) appeal.

I. BACKGROUND

At various times in 1998 and 1999, the plaintiffs took cruises on Norwegian Cruise Line ("NCL") ships, the *Norwegian Sea* and the *Norwegian Star.* The cruises originated in the Port of Houston, Texas, and traveled to foreign ports of call. Both ships sail under the Bahamian flag. Afterwards, the plaintiffs filed suit asserting that they were discriminated against in violation of Title III of the ADA.

The plaintiffs comprise "disabled plaintiffs" and "companion plaintiffs." The disabled plaintiffs allege that physical barriers on the ships denied them access to: (1) emergency evacuation equipment and emergency evacuation-related programs; (2) facilities such as public restrooms, restaurants, swimming pools, and elevators; and (3) cabins with a balcony or a window. The disabled plaintiffs also allege that NCL charged them a premium for use of the four handicapped-accessible cabins and the assistance of crew members. The companion plaintiffs allege that they were discriminated against and denied access to the ships' facilities and amenities because of their "known association" with the disabled plaintiffs.

Alleging their intent to take future NCL cruises, the plaintiffs sought a declaratory judgment, injunctive relief, and reasonable attorneys' fees and costs. More specifically, the plaintiffs sought injunctive relief requiring NCL to remove certain barriers, some temporary and some permanent, that obstructed their access to the ships' facilities. NCL moved to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

After considering the motion, the district court: (1) ruled that foreign-flagged cruise ships are subject to Title III of the ADA; (2) dismissed the plaintiffs' claim concerning removal of physical barriers because the federal government failed to promulgate the necessary regulations; and (3) ruled that the companion plaintiffs stated a claim for associational discrimination.[1] The district court certified the matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we accepted the certification.[2]

II. STANDARD OF REVIEW

This court reviews de novo the district court's grant or denial of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *See ~~Frank~~ v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir.2002). "The complaint must be liberally construed in favor of the plaintiff, and all the facts pleaded in the complaint must be taken as true to determine whether the plaintiff has stated a valid claim for relief." *Haynes v. Prudential Health Care*, 313 F.3d 330, 333 (5th Cir.2002) (citations and quotation omitted). "The dismissal will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." *Id.* The district court's interpretation of a statute, the primary issue in this case, is also subject to de novo review. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 (5th Cir.2000).

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[1] The Government's duty to promulgate regulations pertaining to cruise ships, according to the district court, stemmed from 42 U.S.C. §§ 12186(a), (b).

[2] The district court also ruled that the plaintiffs were not entitled to attorneys' fees and court costs. The parties have not addressed these issues on appeal. Furthermore, because we conclude that Title III of the ADA does not apply to foreign-flagged cruise ships, we do not reach the other issues decided below and subsequently raised in this appeal (*i.e.*, whether the federal government had a duty to promulgate regulations and whether the non-disabled plaintiffs stated a claim for associational discrimination).

III. DISCUSSION

NCL challenges the district court's conclusion that Title III of the ADA applies to foreign-flagged cruise ships. NCL asserts that there is no evidence that Congress intended Title III to apply to foreign-flagged vessels or that Congress even considered the issue. Although, as will be seen, arguments can be made both ways concerning the interpretation of congressional intent, we are persuaded that NCL is correct.

Title III of the ADA provides that: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a)(2000). Title III also prohibits discrimination against disabled individuals on "specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. § 12184(a)(2000). Both "public accommodations" and "specified public transportation services" are subject to the barrier removal requirements of Title III. *See* 42 U.S.C. §§ 12182(b)(2)(A)-(C)(2000).[3]

It is settled that "a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) (citing *Wildenhus' Case*, 120 U.S. 1 (1887)). However, the local sovereign is under no obligation to exercise its authority to the outer limits of its jurisdictional reach. *Benz*, 353 U.S. at 142. Since "the exercise of that jurisdiction is not mandatory but discretionary," *id.*, the Supreme Court held, to apply domestic law to foreign vessels entering United States waters, "there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147. Absent an affirmative intention, "such appeal should be directed to the Congress rather than the courts." *Id.*

In *Benz*, the Supreme Court considered whether the Labor Management Relations Act of 1947 ("LMRA") applied to a dispute involving "a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." 353 U.S. at 139. The Court answered that question in the negative. *Id.* If Congress had "so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within its territorial waters." *Id.* at 142. But given the dearth of legislative history evincing Congress's intent to apply the LMRA to foreign-flagged vessels, *id.* at 143-147, the Court concluded that Congress had not "fashion[ed] itself to resolve labor disputes between nationals of other countries operating ships under foreign laws." *Id.* at 142.

Likewise, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which addressed whether the National Labor Relations Act ("NLRA") applied to the "maritime operations of foreign-flag ships employing alien seamen," *id.* at 13, the Court again emphasized that the decisive question was not whether Congress had the power to apply the NLRA to foreign-flagged ships, but whether Congress had chosen to do so. *See id.* at 17. The *McCulloch* plaintiffs asserted that their case, unlike *Benz*, involved "a fleet of vessels not temporarily in the United States waters but operating in a regular course of trade between foreign ports and those of the United States[.]" *McCulloch*, 372 U.S. at 19-20. The Court found the distinction unavailing.

As in *Benz*, the *McCulloch* plaintiffs were "unable to point to any specific language in the Act itself or in its extensive legislative history that reflect[ed] such a congressional intent." *McCulloch*, 372 U.S. at 20. Accordingly, the Court held that the NLRA did not apply to foreign-flagged ships, and it reiterated that the plaintiffs should petition "to the Congress rather than to us." *Id.* at 22 (citation omitted).

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[3] The district court found that Title III applies to cruise ships as both a "public accommodation" and a "specified public transportation service." NCL did not dispute this issue in the district court, and does not raise the issue on appeal. Therefore, we assume, without deciding, that Title III applies to cruise ships generally and limit this decision to foreign-flagged cruise ships. Whether Title III applies to domestic cruise ships remains an open question in this circuit.

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) ("*ARAMCO*"), amplifies the Supreme Court's adherence to established principles of statutory construction and fundamental tenets of international law. In *ARAMCO*, the Court considered whether Title VII applied "extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad." *Id.* at 247. The Court stated that "[i]t is a longstanding principle of American law that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 248 (citations and quotations omitted). "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* (citing *McCulloch*, 372 U.S. at 20-22). Therefore, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *ARAMCO*, 499 U.S. at 248 (quoting *Benz*'s requirement of clear expression by Congress, 353 U.S. at 147).

The EEOC, relying on two statutory provisions, contended that Congress did intend for Title VII to apply abroad. First, the EEOC argued that Title VII's definitions of "employer" and "commerce" were sufficiently broad to include American companies located beyond the United States. Despite conflicting plausible interpretations of the relevant language, the Court found that it "need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application[.]" *ARAMCO*, 499 U.S. at 250. Moreover, under the EEOC's interpretation, "[t]he intent of Congress as to the extraterritorial application of this statute

must be deduced by inference from boilerplate language which can be found in any number of Congressional acts, none of which have ever been held to apply overseas." *Id.* at 250-51 (citing Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*) (other citations omitted).

Second, the Court rejected the contention that the "alien exemption" provision created a negative inference supporting application of Title VII abroad. "Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are not willing to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *ARAMCO*, 499 U.S. at 255.

The Court also found that other aspects of Title VII belied the EEOC's position. Title VII only addressed issues of state sovereignty, and Congress failed to provide any mechanisms for the statute's overseas enforcement. Moreover, unlike the Age Discrimination in Employment Act ("ADEA"), a parallel statute, Congress did not address conflicts with laws of other nations.[4]

Together, *Benz* and *McCulloch* prohibit United States courts from applying domestic statutes to foreign-flagged ships without specific evidence of congressional intent. Under the Supreme Court's framework, Congress may enact legislation that governs foreign-flagged cruise ships operating within United States waters, but it must clearly indicate its intention to do so. *See Benz*, 353 U.S. at 147. *ARAMCO* applies the same clear-statement requirement to gauge the extraterritorial application of statutes.

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[4] After the passage of the ADEA several circuits determined that it could not be applied extraterritorially to "Americans employed outside the United States by American employers." *Cleary v. United States Lines, Inc.*, 728 F.2d 607, 610 (3d Cir.1984); *see also Thomas v. Brown & Root, Inc.*, 745 F.2d 279, 281 (4th Cir.1984) (per curiam); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827, 828-29 (10th Cir.1984). However, shortly thereafter, Congress amended the ADEA to allow extraterritorial application under certain circumstances. *See generally* 29 U.S.C. §§ 623 and 803. Consequently, after the *ARAMCO* decision, Congress conformed Title VII to the ADEA and included as "employees" United States citizens working "in a foreign country." *See* 42 U.S.C. § 2000e(f)(2000). Title VII also now exempts American employers located abroad from compliance with Title VII if it would cause the employer "to violate the law of the foreign country in which such workplace is located." 42 U.S.C. § 2000e-1(b)(2000).

There is no indication, either in the statutory text or in the ADA's extensive legislative history, that Congress intended Title III to apply to foreign-flagged cruise ships. If Congress had so intended, "it would have addressed the subject of conflicts with foreign laws and procedures." *ARAMCO*, 499 U.S. at 256. Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved.[5]

Furthermore, an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains[.]" *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir.2001) (recognizing that the "*Charming Betsy* canon . . . has traditionally justified a narrow interpretation of ambiguous legislation to avoid violations of international law"). Thus "[b]ecause Congress legislates against the backdrop that includes those international norms that guide comity analysis, absent a contrary legislative direction the doctrine may properly be used to interpret any statute." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (2d Cir.1996). Because the Title III barrier removal provisions may govern the finest details of maritime architecture in the quest to render ships fully accessible to disabled passengers, those provisions pose a stark likelihood of conflicts with the standards set out in the International Convention for Safety of Life at Sea ("SOLAS").[6] Therefore, as a matter of statutory construction, Title III must be narrowly construed in a manner that avoids these potential conflicts. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding an implicit repeal of a treaty in ambiguous congressional action.").

Nevertheless, the plaintiffs offer several counter-arguments. First, the plaintiffs contend that because the ADA applies to cruise ships generally, it presumptively applies to foreign-flagged cruise ships, absent a specific exemption. Plaintiffs rely primarily on *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923), to support this argument.[7]

In *Cunard*, the Supreme Court held that the National Prohibition Act, enacted to enforce the Eighteenth Amendment, applied to foreign-flagged vessels in United

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[5] Under international law, the flag state is responsible for adopting and enforcing laws to protect the welfare of the crew and passengers aboard a ship and to maintain good order thereon, and for ensuring that activities aboard the ship do not endanger other ships or the marine environment. This responsibility continues at all times, wherever the ship is located. Restatement (Third) of the Foreign Relations Law of the United States § 502 cmt. a (1987).

[6] The Passenger Vessel Access Advisory Committee ("PVAAC"), a government-created body, identifies apparent conflicts between the Title III barrier removal standards and SOLAS in its recent report. *See* PVAAC Report at Chapter 13, Parts I-II available at http://www.access-board.gov/news/pvaac-rept.htm (referencing potential conflicts between SOLAS and the guidelines announced by the ADAAG Review Advisory Committee – the governmental body tasked by Congress with formulating the Title III barrier removal guidelines). Thus, there is little, if any, dispute that Title III barrier removal requirements potentially conflict with SOLAS, a treaty the United States has ratified and honors. *See United States v. Locke*, 529 U.S. 89, 102-03 (2000).

[7] Plaintiffs also point to *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), to support their claim that congressional silence is not dispositive. In *Yeskey*, a Title II ADA case, the Supreme Court interpreted the term "public entity" to include state prisons. *Yeskey*, unlike the instant case, found Congress's intent from the express statutory language, and not from its silence. *Id.* at 210. The Court's axiomatic observation that statutes may have unanticipated applications does not alter the presumption against extraterritorial application.

States ports. *Id.* at 124-26. Based on the statute's terms, the Court found that Congress intended the Act to "be operative throughout the territorial limits of the United States" including "all merchant vessels, whether foreign or domestic," when within those limits. *Id.* at 129. The Court noted that the Act "contains no exception of ships in either class and the terms in which it is couched indicate that none is intended." *Id.* at 126. Any exception for foreign-flagged ships, the Court said, would defeat the attainment of the Act's obvious purpose—to prevent the use of intoxicating liquor as a beverage. *See* 27 U.S.C. § 12 (1919). Last, the Act's specific exemption for transportation of liquor through the Panama Canal expressed Congress's intent to apply the statute to all vessels within the territorial waters of the United States. *Id.* at 128-29.

Cunard does not control. First, the Supreme Court premised *Cunard* on the all-pervasive reach of the Eighteenth Amendment and its enforcing statute on specific inferences from the Panama Canal provision. Second, unlike *Benz*, *McCulloch*, and *ARAMCO*, *Cunard* did not involve the possibility of extraterritorial application, but instead regulated only the commercial transport of liquor into United States ports. As the Court noted, "the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operation, like that of the Amendment, to the territorial limits of the United States." *Cunard*, 262 U.S. at 129.

This second distinction is significant. Extraterritorial application of any statute is impermissible absent "the affirmative intention of the Congress clearly expressed[.]" *Benz* 353 U.S. at 147; *ARAMCO*, 499 U.S. at 248; *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (recognizing that "the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind"). This well-founded clear-statement rule serves "to protect against unintended clashes between our laws and those of other

nations which could result in international discord." *ARAMCO*, 499 U.S. at [illegible]8. In the present case, many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters. The plaintiffs insist, however, that Title III need not be enforced beyond United States waters. They argue that this suit seeks enforcement within the United States only, or in the alternative, that courts can choose to enforce those aspects of Title III that do not conflict with international law or are not permanent in nature. This approach is inconsistent with the Supreme Court's pronouncements in *Benz*, *McCulloch*, and *ARAMCO*. In none of those cases did the Court examine each proposed application of domestic law to determine whether it might conflict with other nations' laws. Whether Title III's barrier removal provision, if applied to foreign-flagged cruise ships, would have extraterritorial impact is a matter of statutory construction, not a fact-intensive inquiry. Thus, potential conflicts with transnational or international law mandate that we construe the statute narrowly to avoid international discord.[8]

The plaintiffs next rely upon the Eleventh Circuit's decision in *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir.2000), *reh'g denied*, 284 F.3d 1187 (11th Cir.2002). In *Stevens*, the court found that Title III applies to those aspects of cruise ships (restaurants, retail stores, health spas, etc.) that qualify as public accommodations. *Id.* at 1241. Further, since Congress did not exclude coverage of foreign-flagged cruise ships while in domestic waters, the court reasoned that the ADA must apply to them. In this connection, the court viewed *ARAMCO*'s presumption against "extraterritorial" application of domestic law as inapposite, because it did not consider Title III's requirements to apply outside United States waters. *Id.* at 1242.[9]

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[8] *McCulloch* did not examine individual applications of the NLRA to reach its result. Instead, the Court pointed to the prospective conflict that would result from "the concurrent application of the Act and the Honduran Labor Code[.]" 372 U.S. at 21. This impending conflict exemplified the strong basis for its cannon of construction mandating a clear congressional statement. As a result, the Court ruled, as a matter of statutory construction, that the statute could not be applied extraterritorially based on the "possibility of international discord[.]" *Id.*

Stevens limited the *Benz* and *McCulloch* presumption against application of American law strictly to the "internal management and affairs," specifically labor-management relations, of a foreign-flag ship. Given Congress's intent to apply Title III broadly, the *Stevens* court concluded instead that *Cunard* controlled.

With due respect, we find *Stevens* unpersuasive. In *Stevens*, the court maintained that Congress's silence as to cruise ships meant not only that Title III applied to cruise ships, a contention we do not comment upon, but that the coverage of cruise ships necessarily implied coverage of foreign-flag cruise ships. This latter inference disregards the Supreme Court's admonition that before applying domestic law in the "delicate field of international relations," Congress must clearly express its intent. *McCulloch*, 372 U.S. at 21.

That Congress intended Title III to have "broad reach" is insufficient to warrant application to foreign-flagged cruise ships. Title VII and the ADEA, remedial statutes comparable in breadth and purpose to the ADA, were also intended to have "broad reach." *See Miller v. Pub. Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir.1997) (recognizing that the "ADA is part of the same broad remedial framework as the ADEA and Title VII, and that all the anti-discrimination acts have

been subjected to similar analysis"). Nevertheless, Congress's failure specifically to address extraterritorial implications and conflicts with international law proved fatal to both Title VII and the ADEA in this regard. The Supreme Court's decision in *Cunard*, by contrast, turned on more specific statutory language and the nationally pervasive reach of the Eighteenth Amendment and implementing statutes.

Ultimately, the *Stevens* court's attempt to distinguish *Benz* and *McCulloch* is unpersuasive. Like those cases, the present case deals with the "internal management and affairs" of a foreign-flagged ship. *See McCulloch*, 372 U.S. at 20. As noted above, the plaintiffs' proposed accommodations, if applicable, would require NCL to adjust evacuation procedures and responsibilities of the crew, and would mandate structural changes to the ships. Thus, it is incorrect to suggest, as *Stevens* does, that such modifications do not involve the "internal management and affairs" of the ship merely because they were requested by a passenger rather than an employee. Further, the court's order on rehearing essentially concedes that portions of Title III will apply extraterritorially, but it sidesteps the obvious implication in terms of *Benz*, *McCulloch*, and *ARAMCO*.

Last, the plaintiffs rely on the opinions of the Department of Justice ("DOJ") and the Department of Transportation ("DOT") that Title III applies to foreign-flagged cruise ships. The opinions of DOJ and DOT are presented in technical assistance manuals and public comments, not formal adjudications or rulemaking. *See* DOJ TITLE III TECHNICAL ASSISTANCE MANUAL III-1.2000(d); *See* 56 FED.REG. 45,584, 45,600 (1991). Nonetheless, the plaintiffs argue that these opinions are entitled to *Chevron* deference.

These informal administrative opinions are not entitled to *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron [U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)]-style deference." *Id.* (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade[.]'" *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (citing *ARAMCO*, 499 U.S. at 256-58). For the reasons discussed above, the respective positions of DOJ and DOT are not persuasive.[10]

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[9] The *Stevens* court attempted to clarify its position in its order denying the request for rehearing. *Stevens*, 284 F.3d at 1187. The court stated that it did not foreclose the possibility of specific conflicts between international laws and Title III, but that those specific questions could not be addressed at the motion to dismiss stage. *Id.* However, as discussed above, the court's approach is misguided. The conflicts with international law has statutory construction implications, above and beyond any factual dispute that may exist. The *Stevens* court failed to account for these implications, and therefore erred in its construction of Title III.

In the end, "when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *ARAMCO*, 499 U.S. at 258 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)). Congress, in enacting Title III of the ADA, failed to express any intention to subject foreign-flagged cruise ships to its dictates. Thus, application of Title III to foreign-flagged cruise ships is impermissible.

IV. CONCLUSION

Foreign-flagged cruise ships are not subject to Title III of the ADA unless and until Congress clearly expresses its intention to do so. We therefore sustain, albeit on different grounds, the district court's dismissal of the disabled plaintiffs' barrier removal claims. However, we reverse the district court to the extent that any Title III ADA claims remained, including those of the non-disabled plaintiffs, and remand for further proceedings consistent herewith.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[10] We must also note that Title III directs DOJ and DOT to issue regulatory guidelines with respect to both new construction and barrier removal. *See* 42 U.S.C. § 12186(b). Both agencies promulgated regulations pertaining to barrier removal. *See* 28 C.F.R. 36.304 (2003). DOJ and DOT also promulgated regulations concerning new construction and alterations. *See* 28 C.F.R. § 36.406(a)-(d)(2003). However, DOJ and DOT specifically exempted cruise ships, which demanded—because of unique concerns—separate new construction and alteration regulations. *See* 28 C.F.R. PT. 36, APP. B, at 664 (2003) (stating that DOJ "will not interpret the new construction and alterations provisions of Subpart D" to apply to cruise ships "pending further development of specific requirements"). Amazingly, now more than a decade since the ADA's passage, DOJ and DOT have yet to issue new construction and alteration regulations specific to cruise ships. Nevertheless, these agencies continue to demand that existing cruise ships meet the rigors of the barrier removal guidelines, even though newly constructed cruise ships remain altogether unregulated. The DOJ and DOT maintain this curious position despite their self-imposed regulatory mandate that "requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for [new construction and] alteration[.]" 28 C.F.R. § 36.304(g)(1). However, because we hold that Title III may not be applied to foreign-flagged cruise ships, we need not reach this thorny regulatory issue.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-00-2649

DOUGLAS SPECTOR, ET AL., PLAINTIFF
v.
NORWEGIAN CRUISE LINE LTD, d/b/a NORWEGIAN CRUISE LINE, DEFENDANT

Filed Sept. 10, 2002

MEMORANDUM AND ORDER

Pending before the Court is the defendant's motion to dismiss (Dkt. # 6). The motion is GRANTED in part and DENIED in part, as explained below;

FACTUAL AND PROCEDURAL BACKGROUND

In this case, the plaintiffs allege that the defendant has violated Title III of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12181, *et seq.* Several of the plaintiffs, Douglas Spector, Julia Hollenbeck, and Rodger Peters, have physical impairments requiring them to use either a wheelchair or electric scooter for mobility (the "mobility-impaired plaintiffs"). The remaining plaintiffs, Ana Spector and David Killough, are not disabled, but traveled on cruises with Douglas Spector and Julia Hollenbeck, respectively (the "companion plaintiffs"). The defendant, Norwegian Cruise Line Limited d/b/a Norwegian Cruise Lines ("NCL"), is a corporation organized under the laws of the Bahamas, with its principal place of business in Miami, Florida.

On various dates during 1998 and 1999, the plaintiffs took cruises on two of NCL's ships, the "Norwegian Sea" and the "Norwegian Star." Both ships sail under the Bahamian

flag[1] and conduct cruises originating in the Port of Houston, Texas. Though each ship can carry hundreds of passengers, they each have only four cabins that are accessible to mobility-impaired passengers. NCL also imposes additional surcharges on such passengers and their companions for use of the accessible cabins and for assistance from crew members. The ships also have barriers in their existing facilities that deny mobility-impaired passengers access to the ships' programs, services, and facilities. For example the ships maintain evacuation equipment and programs in locations that are not accessible to mobility-impaired passengers. The mobility-impaired plaintiffs allege that holding the programs in these areas prevented them from participating in the programs during their cruises, denied them services provided to passengers that were not mobility-impaired, and otherwise denied them access to facilities on the ship.[2] The companion plaintiffs claim that the barriers prevented them from participating in activities as well, because they had to choose between missing activities and leaving their mobility-impaired companions alone.

On August 1, 2000, the plaintiffs filed suit against

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[1] NCL has requested that the Court take judicial notice of the ships' place of registry. *See* Dkt. # 6, Ex. A (LLOYD'S REGISTRY OF SHIPS 1688 (2000). A ship's place of registry is capable of judicial notice because it is a matter of public record, and is capable of accurate and ready determination from such records. *See* FED. R. EVID. 201. Also, both the plaintiffs and the United States have had the opportunity to respond, but neither has objected to the request. *Id.* Finally, taking judicial notice of this evidence outside the pleadings does not convert NCL's motion to dismiss into a motion for summary judgment. *See Barron v. Reich.* 13 F.3d 1370. 1377 (9th Cir. 1994). Consequently, the Court takes judicial notice that the "Norwegian Sea" and the "Norwegian Star" are registered under the Bahamian flag.

[2] In their response to the motion to dismiss, the plaintiffs also claim that NCL refused to provide accessible transportation to and from "shore excursions" at the ports of call on the cruise. *See* Dkt. # 14 at 2. These factual allegations are not contained in the first amended complaint. *See* Dkt. # 4. The Court therefore will not consider them when deciding the pending motion to dismiss.

NCL. They allege that NCL has discriminated against them because of their disabilities, or because of their association with disabled persons. The plaintiffs also seek to certify a class on behalf of "all current and former passengers of NCL cruises" with mobility impairments, and those who NCL "discriminated against because of their known association with" mobility-impaired persons.[3] Alleging their intent to take future NCL cruises, the plaintiffs request a declaratory judgment, injunctive relief, reasonable attorneys' fees, and costs of court. NCL now moves to dismiss the complaint for failure to state a claim. At its request, the Court has granted the United States leave to participate in the case as amicus curiae on behalf of the plaintiffs.

STANDARD OF REVIEW

Rule 12(b)(6) provides that a party may move to dismiss an action for "failure to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted. *Doss v. South Cent. Bell Tel. Co.*, 834 F .2d 421, 424 (5th Cir. 1987) (citing *Kaiser Aluminum & Chern. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982)). When considering a Rule 12(b)(6) motion, a court must accept the plaintiff's allegations as true and draw all reasonable inferences in its favor. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993); *United States* v. *Gaubert*, 499 U.S. 315, 327 (1991). The court may not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts. *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999) (citing *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir.1999); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). "A court may dismiss a

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[3] As the issue of class certification is not yet before the Court, the Court will treat the complaint as an action brought by the individual plaintiffs. *See Kaplan v. Utilicorp United. Inc.*, 9 F.3d 405,407 (5th Cir. 1993).

complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bonner v. Henderson*, 147 F.3d 457, 459 (5th Cir. 1998) (quoting *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994) (citation omitted).

DISCUSSION

NCL argues that the plaintiffs cannot maintain a cause of action against it under Title III of the ADA for several reasons. First, NCL argues that requiring its ships to comply with the ADA is an impermissible extraterritorial application of the statute. Next, NCL argues that it is not required to remove barriers from its ships because the administrative agencies responsible for promulgating regulations regarding cruise ships have failed to do so. Finally, NCL contends that the companion plaintiffs cannot bring claims for "associational discrimination" because their allegations do not demonstrate that they were targeted for discrimination because of their association with disabled persons. The Court will examine each argument in turn.

I. APPLICATION OF THE ADA TO NCL'S SHIPS WHILE DOCKED IN THE PORT OF HOUSTON.

A. Cruise ships as "public accommodations" under Title III of the ADA.

Before addressing whether the ADA applies to foreign-flagged cruise ships, the Court must evaluate whether the ADA applies to cruise ships at all. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Thus, to apply to NCL's ships, Title III must include cruise ships within the definition of "public accommodations."[4]

1. Prior precedent

Several courts have held that Title III applies to cruise ships. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) *("Stevens I"), modified on other grounds on reh'g* 284 F.3d 1187 (11th Cir. 2002) *("Stevens II"); Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057, 1061 (D. Haw. 1999). For example, the Eleventh Circuit noted that Congress has defined "public accommodation" to include a wide variety of public facilities, including restaurants, theaters, shopping centers, day care centers, and health spas, as long as the operation of those facilities affects commerce. *See Stevens I*, 215 F.3d at 1243 (quoting 42 US.C. § 12181(7)). As cruise ships often contain some of the facilities enumerated in the statute, and Congress chose to define "public accommodations" by type of facility rather than location, the court held that "those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for purposes of Title III." *Id.* The court added, however, that Title III would not apply to cruise ships if the defendants demonstrated that the ship in question did not contain facilities enumerated in § 12181(7), a mixed question of law and fact. *Id.* at 1241 n.8. The court also explained that obligations of the United States under certain treaties or maritime conventions might limit or preclude application of

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[4] For purposes of the motion, NCL concedes that cruise ships fall within Title III's definition of "public accommodations." It claims that the Court does not need to resolve this issue to determine whether to dismiss the plaintiffs' claims. However, NCL makes several arguments regarding the potential conflicts between Title III and international maritime treaties and conventions governing cruise ships. These international regulations apply to all ships, foreign-flagged or otherwise, traveling through international, waters. Consequently, NCL's arguments regarding these conflicts require the Court to determine not only whether [illegible]le III applies to foreign-flagged cruise ships, but also to cruise ships in general. The Court therefore will examine this issue before addressing the parties' arguments that concern only foreign-flagged ships.

the ADA's accessibility requirements to cruise ships under some circumstances. *Id.* at 1243 n.8, On rehearing, the court added that consideration of every possible conflict between the ADA's accessibility requirements and maritime treaties and conventions was not appropriate on a motion to dismiss under 12(b)(6). *See Stevens II*, 284 F.3d at 1188.

The district court in *Deck* came to a similar result through different reasoning. In *Deck*, the court examined the opinions of the Department of Justice and the Department of Transportation, the two administrative agencies charged with implementing regulations under the ADA. *See Deck*, 51 F. Supp. 2d at 1060. The Department of Justice found that facilities on cruise ships were "public accommodations" to the same extent they would be on land.[5]

> The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters [sic] raised questions about the applicability of this part to places of public accommodation

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[5] The Department of Justice's Title III Technical Manual also explains the application of Title III to cruise ships:

> If a ship, or portion of a ship, functions as one of the twelve categories of places of public accommodation, the ship is also subject to the title III requirements for places of public accommodation.
>
> ILLUSTRATION: A cruise ship is owned and operated by a private entity whose primary business is to operate cruise ships. On the ship are places of lodging, restaurants, bars, a health club, and a nightclub. The private entity is a public accommodation and must comply with the applicable requirements of title III.
>
> Places of public accommodation aboard ships must comply with all of the title III . requirements, including removal of barriers to access where readily achievable.

Title III Technical Assistance Manual III-1.2000 (1993).

> operated in mobile facilities (such as cruise ships, floating restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of facility." Thus the requirements of subparts Band C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (§ 36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in § 36.301.

Id. (quoting 28 C.F.R. Pt. 36, App. B). The Department of Transportation agreed with the Department of Justice, and made similar findings. *Id.* (citing Transportation for Individuals with Disabilities, 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991)). The district court found the agencies' reasoning persuasive, and held that the ADA applies to cruise ships. *Id.*

2. Agency deference.

The plaintiffs and the United States argue that, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), the Department of Justice and the Department of Transportation's interpretation of Title III is entitled to deference. NCL disagrees, pointing out that the agencies' application of Title III to cruise ships was made in technical assistance manuals and public comments rather than formal adjudications or rule-making procedures. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference."). However, courts do defer to an agency's interpretation of its

own regulations if they are ambiguous. *Id.* at 588 (citing *Auer v. Robbins*, 519 US. 452, 461 (1997)). Here, the regulations prohibit places of public accommodation from discriminating on the basis of disability. *See* 28 C.F.R. § 36.201. A place of public accommodation includes a "facility" containing, among other things, places of lodging and restaurants. *Id.* § 36.104. A facility includes "rolling stock or other conveyances," which the Department of Justice has interpreted to include cruise ships. *See* 28 C.F.R. Pt. 36, App. B (discussing 28 C.F.R. § 36.104). The Court finds this phrase ambiguous, and therefore will defer to the Department of Justice's reasonable interpretation of the regulation. *See Christensen*, 529 U.S. at 588 (citing *Auer*, 519 U.S. at 461).[6]

For this reason, and in light of the prior precedent on the issue, the Court concludes that Title III's definition of "public accommodations" encompasses facilities enumerated in that § 12181(7), even if they are located on cruise ships. *See Stevens I*, 215 F.3d at 1241; *Deck*, 51 F. Supp. 2d at 1061.

B. Cruise ships as "specified public transportation" under Title III of the ADA.

Alternatively, the plaintiffs and the United States argue that cruise ships may be held liable as "specified public transportation" under the ADA. Title III prohibits discrimination on the basis of disability on specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. § 12184(a). Providers of "specified public transportation" cannot impose criteria that "screen out or tend to screen out an individual with a disability. . . from fully enjoying" the transportation services provided, unless the provider can show that the criteria are "necessary for the provision of the services offered." *Id.* § 12184(b)(1). Such providers also are subject to the same barrier removal requirements as "public accommodations" under § 12182(b)(2)(A). *See id.* § 12184(b)(2)(C); *see also* 49 C.F.R § 37.5(f) (citing 28 C.F.R §§ 36.301.06) (adopting the Department of Justice's standards concerning "eligibility criteria, reasonable modifications, providing auxiliary aids and services, and removing barriers.").

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[6] Alternatively, even if the interpretation was not entitled to deference, the Court finds it persuasive. *See Christensen*, 529 U.S. at 588 (quoting *Skidmore* v. *Swift* & *Co.*, 323 U.S. 134, 140 (1944) ("[I]nterpretations in contained in formats such as opinion letters are 'entitled to respect' . . . , but only to the extent those interpretations have the 'power to persuade'. . . .").

This argument is consistent with the language of the statute. Title III defines "specified public transportation" as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service. . . on a regular and continuing basis." 42 U.S.C. § 12181(10). In the complaint, the plaintiffs allege that NCL's ships make trips to and from the Port of Houston on a weekly basis, and are available to the general public. These allegations place the ships squarely within the statutory definition of "specified public transportation."

Additionally, this interpretation is consistent with prior administrative and judicial analyses of § 12184. For example, Congress gave the Department of Transportation authority to issue regulations to implement § 12184. *See* 42 U.S.C. § 12186(a)(1). While it has not issued a regulation defining cruise ships as "specified public transportation" under § 12184, the agency has expressed its belief that cruise ships are covered:

> In addition to being public accommodations, cruise ships clearly are within the scope of a "specified public transportation service." The ADA prohibits discrimination in the "full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce [42 U.S.C. § 12184(a)]. "Specified public transportation" is defined by [42 U.S.C. § 12181(10)] as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis."
>
> Cruise ships easily meet the definition of "specified public transportation." Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce. Cruise ships operate according to set schedules or for charter and their services are offered to the general public. Finally, despite some seasonal variations, their services are offered on a regular and continuing basis.

56 Fed. Reg. 45584-01 (1991). Regardless of whether this opinion is accorded *Chevron* deference, the only reported decision on this issue finds its reasoning persuasive, as does this Court. *See Deck*, 51 F. Supp. 2d at 1061. Accordingly, the Court holds that cruise ships are also "specified public transportation" under Title III of the ADA.

C. Possible conflicts between the barrier removal requirements of Title III and the requirements imposed by treaties and maritime conventions governing cruise ships.

NCL argues that the Court should reject the reasoning of the courts and agencies discussed in the previous sections because the application of Title III of the ADA to cruise ships could conflict with international regulations governing the structural and safety requirements of the vessels. According to NCL, seafaring nations have jointly promulgated and adopted a variety of international treaties and maritime conventions to govern how vessels are designed, built, and managed. *See, e.g., International Convention for the Safety of Life at Sea*, 32 U.S.T. 47, T.I.A.S. No. 9700 (1974)

("SOLAS").[7] Nations, including the United States, routinely enforce these regulations on ships that utilize their ports, even if the ships are foreign-flagged. *See, e.g.*, 46 U.S.C. § 3505 (requiring foreign passenger vessels to comply with SOLAS before departing a U.S. port). NCL contends that the accommodations required by Title III could conflict with applicable international standards on the construction and operation of cruise ships. Because the ADA does not clearly override the treaties and conventions that impose the standards, NCL argues that Title III cannot apply to cruise ships. *See Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359,1365 (5th Cir. 1993)(citing *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984)) ("Congress may abrogate a treaty or international obligation entered into by the United States only by a clear statement of its intent to do so.").

NCL's argument cannot prevail for several reasons. First, on a motion to dismiss under Rule 12(b)(6), the Court must construe the allegations in the complaint liberally in favor of the plaintiffs. *See Leatherman*, 507 U.S. at 164; *Gaubert*, 499 U.S. at 327. Motions to dismiss must be denied unless the plaintiffs cannot prevail on any cause of action under the facts alleged in the complaint. *See Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45-46; *Bonner*, 147 F.3d at 459 (quoting *Rubinstein*, 20 F.3d at 166). Allowing the mere "possibility" that the plaintiffs' claims under Title III might conflict with applicable international treaties and conventions to provide a basis to dismiss the claims under Rule 12(b)(6) would draw inferences in favor of NCL, which is prohibited. *See Stevens II*, 284 F.3d at 1188.

Second, Title III expressly addresses the possibility that proposed changes will conflict with new construction and alteration standards external to the ADA. Under Title III, the

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[7] The United States and the Bahamas have ratified SOLAS. *See United States v. Locke*, 529 U.S. 89, 102-103 (2000) (United States); *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1079 (2d Cir. 1993) (the Bahamas).

failure to remove barriers to the disabled in public accommodations does not constitute discrimination unless the changes are "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). Under the ADA, "readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). To determine whether an action is readily achievable, courts must consider: (1) the "nature and cost" of the changes; (2) the facility's financial resources, number of employees, and impact on its expenses, resources, and operation; (3) the covered entity's financial resources, overall size with respect to the number of its employees, and the number, type, and location of its facilities; and (4) the covered entity's operations and relationship to the facility in question. *Id.* Presumably, if a proposed accommodation would conflict with safety requirements under treaties or maritime conventions, then it would not be "readily achievable" as defined in the statute.[8] Resolution of such an issue, however, would require arguments regarding the safety requirements that conflict with each proposed accommodation, which NCL has not yet presented.

Additionally, Congress included an alternative means of compliance in Title III: "[W]here an entity can demonstrate that the removal of a barrier. . . is not readily achievable," the entity must "make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable." 42 U.S.C. § 12182(b)(2)(A)(v). Again, NCL has not yet presented arguments demonstrating that any specific alternative methods of compliance are not "readily achievable" as a matter of law. As a result, NCL's arguments regarding potential conflicts of law do not demonstrate that Title III is inapplicable to cruise ships.[9]

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[8] The Department of Transportation has considered this possibility, and interprets Title III to require its regulations not to conflict with such obligations. *See* Transportation of Individuals with Disabilities, 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (commenting on 49 C.F.R. § 37.109). The Department of Justice has reached a similar conclusion. *See* Title III Technical Assistance Manual m-1.2000(D) (1994 Supp.) (foreign-flagged ships "that operate in United States ports may be subject to domestic law, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement").

Third, NCL's arguments fail to address the plaintiffs' claims that do not relate to physical modifications of the ships. For example, the complaint alleges that NCL charges higher fees to mobility-impaired passengers and their companions in violation of the ADA. *See* First Amended Complaint, Dkt. # 4, at ¶¶ 16-17. It also alleges that NCL conducted programs on the ships in such a way to exclude the mobility-impaired plaintiffs and their companions, for example, by conducting programs in non-accessible areas of the ships. *Id.* at 119. NCL has not explained how granting the plaintiffs injunctive relief from this alleged discriminatory conduct would conflict with international treaties or maritime conventions, and therefore its arguments cannot justify dismissal of those claims. *See Stevens II*, 284 F.3d at 1188.

D. Extraterritoriality of applying the ADA to foreign-flagged ships in the territorial waters of the United States.

Next, NCL contends that permitting claims under the ADA against foreign-flagged ships is an impermissible extraterritorial application of the statute. The Supreme Court has explained that federal laws apply only within the territorial jurisdiction of the United States unless the statutory language expressly reflects otherwise. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). NCL argues that foreign-flagged ships are the sovereign territory of their flag nations. As a result, it claims that application of the

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[9] At a later stage in the litigation, however, the arguments could demonstrate that Title III does not require certain specific proposed modifications or alternative methods of compliance because they are not "readily achievable" as defined in the statute.

ADA to foreign-flagged ships is extraterritorial even when the ships are located in the territorial waters of the United States. According to NCL, such an application is impermissible because the ADA has no express language authorizing its extraterritorial application. Additionally, NCL believes that the application of the ADA to foreign-flagged ships could conflict with the law of the ships' flag states, offending the doctrine of international comity. As before, the Court will examine each argument in turn.

NCL first argues that any application of law to foreign-flagged ships is presumptively extraterritorial unless it is the law of the flag state. It points out that, under traditional maritime principles, seafaring countries defer to the law of the ship's flag state to regulate "administrative, technical, and labor matters." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502(1)(a). This deference arises out of the practical necessity that "there must be some law on shipboard [and] that it cannot change on every change in the waters." *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953). NCL points to the Supreme Court's statement that "the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.'" *Id.* (quoting *United States v. Flores*, 289 U.S. 137, 155 (1933). According to NCL the Fifth Circuit recently validated this principle when it held that the National Labor Relations Act ("NLRA") applied to an American-flagged ship even though the ship operated solely in Hong Kong's territorial waters. *See National Labor Relations Rd. v. Dredge Operators, Inc.*, 19 F.3d 206, 212 (5th Cir. 1994). As a result, NCL argues, applying Title III of the ADA to foreign-flagged ships is extraterritorial even when those ships are within the territorial waters of the United States.[10]

NCL is correct that courts have drawn analogies to territorial sovereignty when attempting to interpret whether the laws of coastal nations apply to foreign-flagged ships. These analogies, however, have not been applied as broadly as NCL represents. For example, the Third Circuit refused to apply the provisions of the Fair Labor Standards Act to an American-flagged vessel employing only foreign seamen and operating only in foreign waters. *See Cruz v. Chesapeake Shipping*, 932 F.2d 218, 232 (3d Cir. 1991). The court explained that:

> [T]he premise that a vessel flying the American flag, even though temporarily a flag of convenience, is a floating piece of American territory for all purposes wherever it may sail is untenable. "Flags of convenience" are a comparatively new phenomenon developed after the conclusion of World War II by certain non-traditional maritime countries for economic reasons. The state whose flag was flown exercised "minimum control over the activities and operations of these vessels." E. Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AM. J. OF INTER. LAW 604. It is generally understood among nations engaged in maritime practice that the state whose flag is flown exercises control over

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[10] With respect to the seas, the United States exercises sovereignty over a belt extending approximately twelve nautical miles from its coastline. *See United States* v. *Alaska*, 521 U.S. 1, 8-9 (1997). Ports are part of the "internal waters" of a nation, and therefore are included within its sovereignty. *See United States* v. *Louisiana*, 394 U.S. 11, 23, 40 (1969). For purposes of this discussion, the Court will use the term "territorial waters" to encompass all waters subject to the jurisdiction of the United States, including the Port of Houston. *See also Cunard*, 262 U.S. at 122 (U.S. jurisdiction extends to "the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending [a set distance].")

> matters such as qualification of masters and officers of the ship, safety of the seas, discipline aboard the vessel, and investigations into instances of navigation causing destruction of life or serious physical damage.

Id. at 227; *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (citing *Wildenhus's Case*, 120 U.S. 1, 12 (1887)) (The law of the flag state normally governs the internal affairs of the ship.). The Supreme Court has expressed similar sentiments, characterizing "the statement . . . that a merchant ship is a part of the territory of the country whose flag she flies" as "a figure of speech, [or] metaphor." *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923).

Similarly, *Dredge Operators* does not stand for the proposition that any application of American law to foreign-flagged ships is extraterritorial. NCL argues that because the Fifth Circuit concluded that application of American law to American-flagged ships in foreign waters is not extraterritorial, it also should follow that application of American law to foreign-flagged ships in American waters must be extraterritorial. The term "extraterritorial" means "beyond the physical and juridical boundaries of a particular state or country." BLACK'S LAW DICTIONARY 588 (6th ed. 1990). Thus, for an application of a statute to be extraterritorial, it must occur outside of the physical boundaries of the nation in question. *See Stevens I*, 215 F.3d at 1242. The reason the Fifth Circuit engaged in a discussion of extraterritoriality in *Dredge Operators* was that the case involved a ship that operated outside of the geographic boundaries of the United States. *See Dredge Operators*, 19 F.3d at 211 (explaining that the refusal of prior courts to apply the NLRA to foreign-flagged ships docked in American ports was not a limitation of the "generally applicable boundaries of commerce," but rather "a judgment that Congress did not intend to interfere with the internal operation of foreign vessels.") (quoting *Dowd v. International*

Longshoremen's Ass'n, 975 F .2d 779, 788 (11th Cir. 1992)). Had the NLRB attempted to exercise jurisdiction over the labor disputes on an American-flagged vessel in an American port, the issue of extraterritoriality never would have arisen.[11]

In *Cunard*, the Supreme Court explained the extent of coastal nations' jurisdiction over foreign-flagged ships while in the coastal nations' territory:

> The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

Cunard, 262 U.S. at 124.[12] In *Cunard*, for example, the Supreme Court held that the National Prohibition Act applied to foreign-flagged ships in American ports. *Id.* at 129-31. Expressly rejecting the argument that a foreign-flagged ship was "a part of the territory of the country whose flag she carries" the Court held that Congress had the power to regulate the ability of foreign- flagged ships to serve alcohol to their passengers and crews while in the territorial waters of the United States. *Id.* at 123. The Court found that Congress had intended to apply the Prohibition Act broadly. *Id.* at 130-31. Examining the Prohibition Act as a whole, the Court also did not find any indication that Congress had not intended to extend the broad reach of the statute to cover all ships in the territorial jurisdiction of the United States, including those sailing under foreign flags. *Id.* at 127-29. As a result, the Court upheld the application of the Prohibition Act to foreign-flagged cruise ships in territorial waters. *Id.* at 131.

NCL acknowledges that the United States has the power to regulate foreign-flagged ships in its territorial waters. It points out, however, that the exercise of this power is discretionary. *See Benz v. Campania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 512 reporter's note 5. NCL contends that Congress did not intend to exercise this discretion to apply the ADA to foreign-flagged cruise ships, even if they were within the territorial waters of the United States. For example, in *McCulloch*, the Supreme Court declined to apply the NLRA to a Honduran-flagged ship with a crew from Honduras even though the ship's owner, a Honduran corporation, was a wholly owned subsidiary of an American company. *See* 372 U.S. at 21-22. Citing the traditional presumption that the law of the flag state governed the internal affairs of the ship, the Court found little evidence that Congress had intended for the NLRA to have such a broad reach. *Id.* (citing *Wildenhus's Case*, 120 U.S. at 12).

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[11] NCL also contends that the plaintiffs' proposed application of the ADA will be extraterritorial under the circumstances of this case. The plaintiffs argue that they do not seek to hold NCL to the restrictions of the ADA once its ships pass out of the territorial waters of the United States. NCL argues that this position is disingenuous because any structural modifications resulting from the restrictions likely would remain in place for the duration of the voyage, necessarily taking place inside and outside the United States' territorial waters. This would create a "de facto" extraterritorial application of the statute which, according to NCL, would be entitled to a presumption against enforcement. NCL has not, however, directed the Court's attention to any cases applying or supporting its arguments. Consequently, the Court declines to adopt this apparently novel approach to application of the presumption against extraterritoriality.

[12] There is one important exception to this rule. Under traditional maritime principles, coastal nations generally permit foreign-flagged ships to pass through their territorial waters as long as the ships do not stop in their territory. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 513(1). This right of "innocent passage" extends to the foreign-flagged ships so long as their passage "is not prejudicial to the peace, good order, or security of the coastal state." *Id.* The ability of the coastal nations to regulate ships in innocent passage is limited to issues involving "safety of navigation, protection of cables and pipelines, fishing, the prevention of pollution, scientific research, and the enforcement of customs, fiscal, immigration, and sanitary regulations," or indiscriminate exclusion of all foreign-flagged vessels for national security purposes. *Id.* at § 513(2). None of the parties argue that the ADA applies to ships in innocent passage or that NCL's ships, which admittedly dock in the Port of Houston for purposes of taking on and discharging passengers, meet this exception.

In *Stevens I*, the Eleventh Circuit examined this issue with regard to Title III of the ADA. See 215 F.3d at 1242. The court compared the broad reach *of* the Prohibition Act, which the Supreme Court examined in *Cunard*, reasoning that Congress also had intended to give Title III a broad reach. *Id.* at 1242-43. It also recognized that most cruise ships serving United States ports sailed under foreign flags. *Id.* at 1243. Since Congress had intended to apply Title III to cruise ships generally, the court found the argument that Congress intended Title III to apply only to domestic cruise ships to be an unreasonable interpretation of the statute. *Id.* Instead, it held that Title III of the ADA applied to foreign flagged cruise ships while in the territorial waters *of* the United States. *Id.* at 1242-43. The Court finds this reasoning persuasive, and therefore rejects NCL's argument. NCL also argues that traditional policies of international comity give rise to a presumption that Congress did not intend for Title III of the ADA to apply to foreign-flagged ships. It notes that traditional maritime principles preclude application of American law to a foreign-flagged ship in its territorial waters unless the vessel presents a threat to the "peace or dignity of the country" or to the "tranquility of the port." *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 295 (5th Cir. 1984) (quoting *Lauritzen*, 345 U.S. at 584-85). NCL argues that the plaintiffs' claims do not implicate either of these concerns and, therefore that the Court find that Title III does not apply to foreign-flagged ships in the territorial waters of the United States.

NCL's arguments to the contrary, foreign-flagged cruise ships are not exempted from compliance with the regulations of port nations. Instead, applicable maritime treaties and traditions permit exemptions where: (1) the ship is engaged in "innocent passage" through the coastal territorial waters of a foreign nation;[13] or (2) the issues regulated involve only the internal affairs of the ship. Neither exemption applies here. The complaint clearly alleges that NCL's ships dock in the Port of Houston, eliminating any argument that they are engaged in innocent passage through the United States' territorial waters. *See* First Amended Complaint, Dkt. # 4, at ¶ 15. Also, applying Title III to the interaction between a foreign-flagged ship and its fare-paying American passengers does not involve the "internal affairs" of the ship, which normally concern only interactions between the foreign captain and crew. *See Stevens I*, 215 F.3d at 1242. Finally, the Court notes that failure to accommodate disabled domestic passengers while in domestic territorial waters directly implicates the territorial sovereign's interest in protecting its citizens' rights. The Court finds this sufficient, in light of the intended broad scope of Title III, to impugn the dignity of the United States ports in which NCL chooses to solicit its customers.

Thus, after considering the relevant precedent, the Court finds that Title III applies to all cruise ships within the territorial waters of the United States, including those registered under foreign flags.[14] As the complaint clearly alleges that NCL's ships discriminated against the plaintiffs while in the Port of Houston, the Court denies NCL's motion to dismiss their claims on this basis.

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[13] *See* note 13, *supra.*

[14] The plaintiffs also argue that DOJ and DOT have determined that Title III applies to foreign-flagged cruise ships, and that this determination is entitled to deference. The Court disagrees. The comments that the plaintiffs reference do not address the issue of foreign-flagged cruise ships directly, instead merely raising the possibility that Title III applies. *See, e.g.*, Title III Technical Assistance Manual III-1.2000(D) (1993) ("Ships registered under foreign flags that operate in United States ports may be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement."); Transportation for Individuals

E. The effect of administrative agencies' failure to create guidelines regarding new construction or alterations of cruise ships on application of Title III's barrier removal requirements.

NCL next argues that the plaintiffs cannot enforce the ADA's provisions requiring removal of physical barriers to the disabled in places of public accommodation because the executive agencies charged with promulgating architectural and structural guidelines have not yet done so with regard to cruise ships.[15] The plaintiffs and the United States disagree, contending that the agencies' failure to promulgate architectural and structural guidelines regarding new construction and alterations does not alter the cruise ships' basic duty to remove barriers to the disabled in existing facilities on cruise ships.

Title III directs the Department of Transportation ("DOT") to issue regulations to carry out the various transportation provisions of the statute, including § 12184. *See* 42 U.S.C. § 12186(a). The Department of Justice ("DOJ") is required to issue regulations carrying out the remaining provisions of Title III. *See* 42 U.S.C. § 12186(b).

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with Disabilities, 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (noting that Congress has jurisdiction over foreign-flagged ships in territorial waters, but that DOT is uncertain whether Title III conflicts with the maritime treaty obligations of the United States).

[15] This argument concerns the plaintiffs' claims only to the extent they seek removal of physical barriers on the ships. It does not apply to the plaintiffs' other claims including, for example, the claims that NCL subjected the plaintiffs to unlawful surcharges for use of accessible facilities and services. *See* 28 C.F.R. § 301(e). It also does not apply to their claims that NCL failed to modify its policies, practices, or procedures to accommodate the plaintiffs. *Id.* § 36.302. *See also Deck,* 15 F. Supp. 2d at 1060-61 (noting that both DOJ and DOT have interpreted the regulations regarding "general nondiscrimination" and nondiscrimination in policies and practices to apply to cruise ships.).

In 1991, DOJ issued regulations governing new construction and alterations of places of public accommodation. *See* 28 C.F.R. §§ 36.401, *et seq.* These regulations require that "[n]ew construction and alterations subject to this part shall comply with the standards for accessible design published as Appendix A to this part (ADAAG)." 28 C.F.R. § 36.406. Shortly thereafter, DOJ issued the ADA Accessibility Guidelines (the "ADAAG") in an appendix to the regulations. *See* 28 C.F.R. Pt. 36, App. A. The ADAAG contain extensive standards for many different examples of places of public accommodation, but do not address cruise ships.[16] Similarly, DOT has not promulgated guidelines for "specified transportation services" that are unique to cruise ships or other passenger vessels. *See, e.g.,* 49 C.F.R. §§ 37.95, 37.109, 38.177.

The United States correctly points out that the ADAAG are intended to apply only to new construction and alterations of public accommodations, which are governed by § 12183. There are significant differences between compliance with § 12183, which regulates only new construction and alterations, and § 12182, which governs barrier removal in existing facilities. The main difference is that retrofitting existing facilities normally is more costly than incorporating accessibility into the designs of newly constructed facilities and alterations. *See* 28 C.F.R. Pt. 36, App. B at 646. Congress recognized this difference, and created different tests for compliance depending on whether Title III was applied to an existing facility or new construction or alterations. *Compare* 42 U.S.C. § 12182(b)(2)(A)(iv) (prohibiting failure to remove barriers where such removal is "readily achievable"), *with* 42 U.S.C. § 12183(a)(I) (requiring newly constructed facilities to be accessible unless the design is "structurally impracticable"). DOJ also took this difference into account when it promulgated § 36.304, utilizing guidelines implementing the higher standard for alterations to govern removal of barriers, but permitting public accommodations to deviate from those requirements if they were not "readily achievable." *See* 28 C.F.R. § 36.304(d); *see also* 28 C.F.R. Pt. 36, App. B at 648-49. The reasoning behind this regulation was that, to the extent modifications within the ADAAG were "readily achievable," they could provide a useful reference point for public accommodations to follow in removing barriers. *Id.* The regulations governing removal of barriers in existing public accommodations also refer to the ADAAG as a limitation on what is necessary to comply with Title III's barrier removal requirements, stating that the "requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for alterations. . . [or] new construction . . ." 28 C.F.R. § 36.304(g}. For the most part, DOT's barrier removal regulations for "specified public transportation" adopt DOJ's barrier removal regulations. *See* 49 C.F.R. § 37.5(f).

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[16] The Department of Justice has explained that, while facilities on cruise ships are "public accommodations" within Title III of the ADA:

> [S]tandards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in Appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

28 C.F.R. Pt. 36, App. B. Similarly, the Title III Technical Assistance Manual states that a cruise ship "is not required to comply with specific accessibility standards for new construction or alterations, because specific accessibility standards for new construction or alteration or cruise ships have not yet been developed." Title III Technical Assistance Manual III-1.2000 (1993).

NCL argues that the agencies' failure to create guidelines governing new construction and alteration of cruise ships excuses it from compliance with the barrier removal requirements of Title III. In essence, NCL claims that DOJ and DOT have failed to provide owners and

operators of cruise ships with any guidance on how to meet their obligations to remove barriers under Title III. It also contends that permitting application of Title III's barrier removal provisions in the absence of such guidelines will subject cruise ships to the whims of individual courts, which could issue inconsistent and possibly conflicting orders on the extent to which the ships must remove barriers.

The United States argues that cruise ships must remove barriers as much as is "readily achievable" regardless of whether the agencies have promulgated standards that would limit the ships' obligations. It suggests that, in the absence of guidelines governing new construction or alterations, facilities must remove barriers to the extent such removal is "readily achievable." The United States also argues that cruise ships should have to provide alternatives to barrier removals that are not readily achievable, or to show that such alternatives are not readily achievable. *See* 28 C.F.R. § 36.305.

The United States proposes several ways in which the Court could enforce the plaintiffs' claims for barrier removal against NCL absent specific guidelines regarding new construction or alterations of cruise ships. First, it suggests that the Court could require the ships to comply with the existing requirements for new construction and alteration of shoreside places of public accommodation. This approach, however, squarely conflicts with DOJ and DOT's interpretations of the ADAAG, which declines to apply such guidelines to cruise ships. *See* 28 C.F.R. Pt. 36, App. B ("[S]tandards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in Appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements."); *see also Deck*, 51 F. Supp. 2d at 1060-61. The Court is required to defer to these interpretations of the agencies' own regulations, and therefore must reject this approach. *See Christensen*, 529 U.S. at 588 (citing *Auer*, 519 U.S. at 461).

Next, the United States argues that, in the absence of applicable guidelines, the Court could determine what accommodations are "reasonable" on a case by case basis. The United States also points out that not all barrier removal corresponds to applicable guidelines for new construction or alterations. For example, the regulations suggest that public accommodations may reposition shelves and telephones, or rearrange tables, chairs, vending machines, display racks, and other furniture. *See* 28 C.F.R. § 304(b)(3)-(5). The guidelines for new construction or alterations generally do not specifically address these types of accommodations. The United States does not, however, explain how the Court would differentiate between removal of barriers that DOJ or DOT hypothetically would cover under future guidelines for new construction or alterations, and those that DOJ and DOT never would address. Additionally, both approaches suggested by the United States give rise to NCL's concerns regarding the potential lack of uniformity from jurisdiction to jurisdiction.

Several courts have examined whether the agencies' failure to create guidelines for new construction or alterations of facilities on cruise ships excuses them from complying with Title III's barrier removal requirements. A district court in Florida, for example, rejected the argument that the agencies' failure to create guidelines excused cruise ships from the accessibility requirements of the ADA. *See Access Now, Inc. v. Holland America Line-Westours, Inc.*, 147 F. Supp. 2d 1311, 1312-13 (S.D. Fla. 2001). Though it noted that "regulations (or other input from the DOJ) would (a) aid the adjudication of this case and (b) serve the cruise industry well by establishing uniform standards," the court held that "[a]pplicable regulations or other forms of guidance from the DOJ . . . , are not a prerequisite to maintain a Title III access action.'" *Id.* (citing *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 950 F. Supp. 393, 394 (D.D.C. 1996), *aff'd sub nom Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). Apparently, the court felt that DOJ and DOT had failed to satisfy the ADA's "clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities" because they had neglected their delegated responsibilities to create cruise ship guidelines for over a decade. *Id.* at 1313 (quoting 42 U.S.C. § 12101(b); *see also Association for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1362 n.4 (S.D. Fla. 2001) (applying the regulations governing barrier removal despite the absence of new construction or alterations guidelines for cruise ships, instead evaluating whether the defendants could reasonably modify their policies, practices, and procedures to accommodate the disabled and whether the modifications were readily achievable).

Other district courts have reached different results. In *Resnick v. Magical Cruise Company*, the court dismissed the plaintiffs' claims that the owner of several cruise ships had violated the ADAAG on new construction and alterations. *See* 148 F. Supp. 2d 1298, 1305 (S.D. Fla. 2001). The court deferred to the DOJ and DOT's statements that the ADAAG did not apply to cruise ships. *Id.* at 1304-05. It found dismissal was appropriate because the owners of the cruise ships had "not been afforded notice of the standards with which they [were] required to comply," but declined to hold categorically that "a claim for denial of access to or on a cruise ship cannot be maintained as [a] matter of law even in the absence of regulations." *Id.* at 1305; *see also Deck*, 51 F. Supp. 2d at 1061 (holding that new construction and alterations provisions of Title III do not apply to cruise ships, but other claims under Title III "are clearly applicable to cruise ships, and thus are properly brought in the instant case.").

Admittedly, this is a difficult issue. After careful consideration, the Court is persuaded that the agencies' failure to create guidelines for new construction or alterations of cruise ships also bars enforcement of Title III's existing barrier removal guidelines. DOJ and DOT have chosen to implement their regulations in a manner that adopts the alterations guidelines as the standard to meet when removing barriers to the disabled. This approach makes sense, as it permits facilities to better remove barriers and protect themselves from liability by complying with the guidelines for alterations, which normally provide very specific instructions regarding various accommodations. Alternatively, facilities may demonstrate that such compliance is not readily achievable, and instead take other readily achievable measures to remove barriers. DOJ and DOT also found that passenger vessels differed from other public accommodations significantly enough to warrant formation of separate guidelines for the vessels. Though they have had over eleven years to do so, DOJ and DOT have failed to fulfill their duty to provide guidance to the owners of cruise ships and other passenger vessels. This is an unfortunate situation, but it is also one that the agencies may remedy at any time by creating guidelines for the new construction or alterations of cruise ships.[17] Until then, the Court declines to force owners of cruise ships to guess which barriers they must remove to accommodate the disabled, or to subject them to varying and possibly conflicting instructions from courts on the issue. The plaintiffs' claims against NCL therefore are dismissed to the extent they seek removal of physical barriers on the cruise ships.

II. The companion plaintiffs' claims for associational discrimination.

Next, NCL argues that the companion plaintiffs' allegations in the amended complaint are insufficient to state

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[17] The plaintiffs also might seek to compel DOJ or DOT to create the guidelines under the Administrative Procedures Act. *See* 5 U.S.C. § 706(1) (permitting individuals to "compel agency action unlawfully withheld or unreasonably delayed").

claims for associational discrimination under Title III.[18] Title III prohibits discrimination by "exclud[ing] or otherwise deny[ing] equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual . . . because of the known disability of an individual with whom the individual . . . is known to have a relationship or association." 42 U.S.C. § 12182(b)(1)(E). To state a valid claim for associational discrimination, courts have held that a plaintiff must allege some "specific, direct, and separate injury" as a result of association with a disabled individual. *Micek v. City of Chicago*, 1999 WL 966970, at *3 (N.D. Ill.); *see also Glass v. Hillsboro Sch. Dist.*, 142 F.Supp.2d 1286, 1288 (D. Or. 2001); *Niemeier v. Tri-State Fire Protection Dist.*, 2000 WL 1222207, at *3-4 (N.D. Ill.).

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[18] NCL also argues that the companion plaintiffs lack standing to maintain claims under Title III. To demonstrate standing, plaintiffs must show that an Article III case or controversy exists by demonstrating that (1) they suffered an injury in fact; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable court ruling is likely to redress the plaintiffs' injury. *See Vermont Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 771 (2000). In addition, plaintiffs must meet prudential limitations on standing, which include "the general prohibition on a litigant's raising another person's legal rights, . . . and the requirement that a plaintiff's complaint fall within the 'zone of interests' protected by the law invoked." *Oak Ridge Care Center, Inc. v. Racine County*, 896 F. Supp. 867, 871 (E.D. Wis. 1995) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). NCL does not contend that the companion plaintiffs' claims do not meet the requirements for Article III standing, which courts have described as "undemanding." *See, e.g., Oak Ridge Care Center. Inc.*, 896 F. Supp. at 872 (citing *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). Instead, NCL claims that the companion plaintiffs' allegations fail to satisfy the prudential limitations on standing because they did not suffer injuries cognizable under Title III, and because they cannot base their claims on the rights of the mobility-impaired plaintiffs. Accordingly, if the companion plaintiffs have failed to allege facts sufficient to support a cause of action for associational discrimination under Title III, then the Court must dismiss their claims for both lack of standing and failure to state claims on which relief may be granted.

For example, courts have found cognizable claims for associational discrimination under Title III where insurance companies deny coverage because the applicant's spouse or partner is HIV-positive. *See, e.g.*, *Cloutier v. Prudential Ins. Co. of America*, 964 F. Supp. 299, 304 n.4 (N.D. Cal. 1997); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1320 (C.D. Cal. 1996). Similarly, plaintiffs may state claims for associational discrimination under Title I where employers take adverse employment actions against them because of their association with disabled individuals.[19] *See Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 760-61 (5th Cir. 1996).

The issue in this case is whether the companion plaintiffs' injuries are sufficiently "separate" from those of the mobility-impaired plaintiffs to constitute associational discrimination under the ADA. NCL argues that the complaint alleges only that it required the mobility-impaired plaintiffs to stay in the more expensive accessible rooms. *See* Amended Compl. at ¶¶ 14, 16. The companion plaintiffs, it contends, were free to purchase tickets for less expensive non-accessible rooms, but instead chose to stay in the same rooms as the mobility-impaired plaintiffs. *Id.* at ¶ 32. The companion plaintiffs also were free to participate in the activities on board the ships, but instead decided to miss the activities to avoid leaving the mobility-impaired plaintiffs alone. *Id.* at ¶ 11 18. NCL argues that these circumstances are analogous to the situation in *Simenson v. Hoffman*, 1995 WL 631804 (N.D. Ill. 1995). In that case, the plaintiffs brought their disabled child to a medical facility for treatment. *Id.* at *1-2. When a physician at the facility saw the child, he refused to provide treatment and expelled the child and his parents from the facility. *Id.* The parents then alleged claims for associational discrimination based upon their expulsion. *Id.* at *2. Because the plaintiffs had sought only treatment for the child, the court held that the ejection from the facility did not constitute an injury to the plaintiffs separate from the denial of the child's treatment. *Id.* at *6. NCL contends that the companion plaintiffs have suffered a similarly indirect adverse effect in this case. *See also Micek*, 1999 WL 966970, at *3 (dismissing the associational discrimination claims of an employee whose insurance claims for speech therapy services for his disabled dependents were denied); *Niemeier v. Tri-State Fire Protection Dist.*, 2000 WL 1222207 (N.D. Ill.) (dismissing the associational discrimination claims of an employee whose insurance claims for treatments for his wife's infertility treatments were denied).

The plaintiffs respond that *Simenson* actually supports their claims for associational discrimination. They point out that other courts have held that non-disabled individuals may state claims for associational discrimination where those individuals sought benefits in addition to those sought by their disabled companions. For example, a court held that a non-disabled plaintiff had stated a claim for associational discrimination against a non-accessible sports facility where plaintiff alleged that he would attend events with his disabled child. *See Johanson v. Huizen Holdings, Inc.*, 963 F. Supp. 1175, 1176 (S.D. Fla. 1997). In another case, several non-disabled plaintiffs alleged claims for associational

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[19] Title I prohibits denial of employment opportunities to a "qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). This associational discrimination provision is nearly identical to its counterpart in Title III, and courts have interpreted both according to the same standard. *See, e.g.*, *Micek*, 1999 WL 966970 at *3; *Discovery House, Inc. v. City of Indianapolis*, 43 F. Supp. 2d 997, 1007 (N.D. Ind. 1999). Also, several courts have interpreted the regulations implementing Title II to provide a cause of action analogous to those found in Titles I and II. *See Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48 (2d Cir. 1997) (citing 28 C.F.R. § 35.130(g); *Discovery House, Inc.*, 43 F. Supp. 2d at 1006-07; *Oak Ridge Care Center, Inc.*, 896 F. Supp. at 872; *Tugg v. Towey*, 864 F. Supp. 1201, 1208 (S.D. Fla. 1994). Accordingly, the Court considers associational discrimination cases applying Title I and II of the ADA persuasive authority in determining whether Title III prohibits NCL's alleged treatment of the companion plaintiffs in this case.

discrimination against the state of Florida for failing provide mental health counseling to their deaf family members that was equivalent in quality to the counseling provided to non-deaf participants in the program. *See Tugg v. Towey*, 864 F. Supp. 1201 1203-04 (S.D. Fla. 1994). The court reasoned that the non-deaf plaintiffs had suffered separate injuries because they also received counseling services. *Id.* at 1208. In contrast, the court in *Simenson* found that the plaintiffs received no benefits from the defendants other than the medical treatment they sought for their disabled child. *See Simenson*, 1995 WL 631804, at *6.

After carefully considering this issue, the Court finds the companion plaintiffs' analogy more persuasive. Unlike the parents in *Simenson*, the companion plaintiffs sought to derive benefits from their stay on NCL's cruise ships that were independent from the benefits enjoyed by the mobility-impaired plaintiffs.[20] The companion plaintiffs took the cruises not only to accompany their disabled friends, but also to enjoy the cruise itself. *Cf. Johanson*, 963 F. Supp. at 1176 (permitting a non-disabled plaintiff to state an associational discrimination claim against a sports facility where he would attend events with his disabled child); *Tugg*, 864 F. Supp. at 1208 (permitting associational discrimination claims when the non-disabled plaintiffs also participated in the mental health counseling program at issue). In addition to this benefit, the companion plaintiffs sought to share cabins with their mobility-impaired traveling companions, a privilege commonly enjoyed by passengers traveling together on cruises. NCL, however, prohibited the companion plaintiffs from enjoying this privilege unless they paid the same allegedly discriminatory higher fee as the mobility-impaired plaintiffs. *See* Amended Compl. at ¶ 32. While NCL did not require the companion plaintiffs to pay extra to receive the benefit of enjoying the cruise, it forced them to pay more to enjoy the privilege of staying in the same rooms with their traveling companions, the mobility-impaired plaintiffs. Under the facts alleged in the amended complaint, the companion plaintiffs would not have incurred this additional fee but for their association with the mobility-impaired plaintiffs. Accordingly, the Court finds that the companion plaintiffs have stated claims for associational discrimination, and denies NCL's motion to dismiss.

III. The plaintiffs' request for sanctions.

Finally, the plaintiffs have requested an award of attorneys' fees from NCL as a sanction for filing the motion to dismiss. After considering the exhaustive and well-prepared briefing of all of the parties, the Court concludes that NCL's motion presented close questions of law that were not sufficiently frivolous to warrant sanctions. The plaintiffs' request is therefore denied.

Conclusion

Accordingly, the Court GRANTS NCL's motion to dismiss in part as follows: the Court dismisses the plaintiffs' claims seeking removal of physical barriers on NCL's cruise ships. The Court DENIES NCL's motion to dismiss the plaintiffs' remaining claims.

Signed this 9th day of September 2002.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

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[20] As the court noted in *Simenson*, the comments to 28 C.F.R § 36.205, which implements Title III's associational discrimination provision, suggest the following example: "if a place of public accommodation refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA." *Simenson*, 1995 WL 631804, at *6 (quoting 28 C.F.R pt. 36, App. B at 634 (2000)). This hypothetical is similar to the facts of this case, but is unhelpful because it does not address the possibility that the companions might have the option to enter the place of public accommodation without their disabled friend.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 02-21154, 03-20056

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLANTS
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS
NORWEGIAN CRUISE LINE, DEFENDANT-APPELLEE.

DOUGLAS SPECTOR, ET AL., PLAINTIFFS-APPELLANTS
v.
NORWEGIAN CRUISE LINE LTD., DOING BUSINESS AS
NORWEGIAN CRUISE LINE, DEFENDANT-APPELLANT.

Appeals from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC
(Opinion 1/12/04, 5 Cir., _____, ____F.3d _______)

Filed Feb. 10, 2004

Before REAVLEY, JONES, AND CLEMENT, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

APPENDIX D

STATUTES

The Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) provides in relevant part:

Section 12101. Findings and Purpose:

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and

practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

* * * *

Section 12181. Definitions

As used in this subchapter:

* * * *

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

* * * *

(9) Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include--

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

* * * *

Section 12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration--

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes--

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or

accommodations available through alternative methods if such methods are readily achievable.

Section 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes--

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms,

telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator

Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

Section 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) Construction

For purposes of subsection (a) of this section, discrimination includes--

(1) the imposition or application by a[1] entity described in subsection (a) of this section of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to--

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the

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[1] So in original. Probably should be "an".

level of service provided to the general public;

(4) (A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent

feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

* * * *

Section 12186. Regulations

(a) Transportation provisions

(1) General rule

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

* * * *

(3) Standards

The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b)(2) and 12184 of this title.

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars

If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such

supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

APPENDIX D

CODE OF FEDERAL REGULATIONS

The Department of Justice's implementing regulations (28 C.F.R. Part 36) for the Americans with Disabilities Act provides in relevant part:

Section 36.104. Definitions:

For purposes of this part, the term--

* * * *

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

* * * *

Section 36.304. Removal of barriers:

(a) General. A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense.

(b) Examples. Examples of steps to remove barriers include, but are not limited to, the following actions—

(1) Installing ramps;
(2) Making curb cuts in sidewalks and entrances;
(3) Repositioning shelves;
(4) Rearranging tables, chairs, vending machines, display racks, and other furniture;
(5) Repositioning telephones;
(6) Adding raised markings on elevator control buttons;
(7) Installing flashing alarm lights;
(8) Widening doors;

(9) Installing offset hinges to widen doorways;
(10) Eliminating a turnstile or providing an alternative accessible path;
(11) Installing accessible door hardware;
(12) Installing grab bars in toilet stalls;
(13) Rearranging toilet partitions to increase maneuvering space;
(14) Insulating lavatory pipes under sinks to prevent burns;
(15) Installing a raised toilet seat;
(16) Installing a full-length bathroom mirror;
(17) Repositioning the paper towel dispenser in a bathroom;
(18) Creating designated accessible parking spaces;
(19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
(20) Removing high pile, low density carpeting; or
(21) Installing vehicle hand controls.

* * * *

(d) Relationship to alterations requirements of subpart D of this part.

(1) Except as provided in paragraph (d)(2) of this section, measures taken to comply with the barrier removal requirements of this section shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404-36.406 of this part for the element being altered. The path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section.

(2) If, as a result of compliance with the alterations requirements specified in paragraph (d)(1) of this section, the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily achievable measures to remove

the barrier that do not fully comply with the specified requirements. Such measures include, for example, providing a ramp with a steeper slope or widening a doorway to a narrower width than that mandated by the alterations requirements. No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others.

(e) Portable ramps. Portable ramps should be used to comply with this section only when installation of a permanent ramp is not readily achievable. In order to avoid any significant risk to the health or safety of individuals with disabilities or others in using portable ramps, due consideration shall be given to safety features such as nonslip surfaces, railings, anchoring, and strength of materials.

(f) Selling or serving space. The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space.

(g) Limitation on barrier removal obligations.

  (1) The requirements for barrier removal under § 36.304 shall not be interpreted to exceed the standards for alterations in subpart D of this part.

  (2) To the extent that relevant standards for alterations are not provided in subpart D of this part, then the requirements of § 36.304 shall not be interpreted to exceed the standards for new construction in subpart D of this part.

  (3) This section does not apply to rolling stock and other conveyances to the extent that § 36.310 applies to rolling stock and other conveyances.

Section 36.305. Alternatives to barrier removal:

(a) General. Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable.

(b) Examples. Examples of alternatives to barrier removal include, but are not limited to, the following actions--

  (1) Providing curb service or home delivery;

  (2) Retrieving merchandise from inaccessible shelves or racks;

  (3) Relocating activities to accessible locations;

(c) Multiscreen cinemas. If it is not readily achievable to remove barriers to provide access by persons with mobility impairments to all of the theaters of a multiscreen cinema, the cinema shall establish a film rotation schedule that provides reasonable access for individuals who use wheelchairs to all films. Reasonable notice shall be provided to the public as to the location and time of accessible showings.

* * * *

Appendix B to Part 36--Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991):

Section 36.104. Definitions:

"Facility." "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. Committee reports made clear that the definition of facility was drawn from the definition of facility in current Federal regulations (see, e.g., Education and Labor report at 114). It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

The term "rolling stock or other conveyances" was not included in the definition of facility in the proposed rule. However, commenters raised questions about the applicability of this part to places of public accommodation operated in mobile facilities (such as cruise ships, floating restaurants, or mobile health units). Those places of public accommodation are covered under this part, and would be included in the definition of "facility." Thus the requirements of subparts B and C would apply to those places of public accommodation. For example, a covered entity could not discriminate on the basis of disability in the full and equal enjoyment of the facilities (§ 36.201). Similarly, a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are "necessary," as provided in § 36.301.

However, standards for new construction and alterations of such facilities are not yet included in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) adopted by § 36.406 and incorporated in appendix A. The Department therefore will not interpret the new construction and alterations provisions of subpart D to apply to the types of facilities discussed here, pending further development of specific requirements.

Requirements pertaining to accessible transportation services provided by public accommodations are included in § 36.310 of this part; standards pertaining to accessible vehicles will be issued by the Secretary of Transportation pursuant to section 306 of the Act, and will be codified at 49 CFR part 37.

A public accommodation has obligations under this rule with respect to a cruise ship to the extent that its operations are subject to the laws of the United States.

The definition of "facility" only includes the site over which the private entity may exercise control or on which a place of public accommodation or a commercial facility is located. It does not include, for example, adjacent roads or walks controlled by a public entity that is not subject to this part. Public entities are subject to the requirements of title II of the Act. The Department's regulation implementing title II, which will be codified at 28 CFR part 35, addresses the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

APPENDIX E

FEDERAL REGISTER

The Department of Transportation's discussion (56 Fed. Reg. 45,584 (Friday, Sept. 6, 1991)) of its regulations implementing the Americans with Disabilities Act provides in relevant part:

[page 45,584]

SUPPLEMENTARY INFORMATION: This portion of the preamble discusses the basis and purpose of part 37. It also responds to comments on the Department's notice of proposed rulemaking on this subject issued April 4, 1991 (56 FR 13856) and highlights provisions in part 38, the Department's promulgation of the accessible vehicle specifications developed by the Architectural and Transportation Barriers Compliance Board.

* * * *

[page 45,599-45,600]

Section 37.109. Ferries and Other Vessels

As with the NPRM, this section is reserved in the final rule. The reason for this action is that, at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels. We note that the DOJ has determined that passenger vessels encompassing places of public accommodation (e.g., cruise ships, floating restaurants) are subject to the general nondiscrimination and policies and practices portions of its title III rule (Subparts B and C of 28 CFR part 36). The Department of Transportation anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels. The Department thanks commenters who provided information on this subject, which we will be using in this effort, along with information generated by a consultant the Department is engaging to look into these matters.

The Department does want to make it clear its view that the ADA does cover passenger vessels, including ferries, excursion vessels, sightseeing vessels, floating restaurants, cruise ships, and others. Cruise ships are a particularly interesting example of vessels subject to ADA coverage.

Cruise ships are a unique mode of transportation. Cruise ships are self- contained floating communities. In addition to transporting passengers, cruise ships house, feed, and entertain passengers and thus take on aspects of public accommodations. Therefore cruise ships appear to be a hybrid of a transportation service and a public accommodation. As noted above, DOJ covers cruise ships as public accommodations under its title III rules.

In addition to being public accommodations, cruise ships clearly are within the scope of a "specified public transportation service." The ADA prohibits discrimination in the "full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce (Section 304(a)). "Specified public transportation" is defined by Section 301(10) as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis."

Cruise ships easily meet the definition of "specified public transportation." Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce. Cruise ships operate according to set schedules or for charter and their services are offered to the general public. Finally, despite some seasonal variations, their services are offered on a regular and continuing basis.

Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they are in U.S. ports, subject to treaty obligations. A state has complete sovereignty over its internal waters, including ports. Therefore, once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state. In addition, a State may condition the entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. The United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports.

We would point out that, even though the United States has territorial jurisdiction over foreign-flag vessels in its ports, its ability to enforce its domestic laws may be limited by treaty. This poses a problem only where the terms of a statute are in conflict with the terms of a treaty. No determination has been made about whether the provisions of the ADA are in conflict with any treaty. Before promulgating any specific requirements affecting foreign-flag ships, the Department would see if any treaty provisions (e.g., provisions of the Convention on Safety of Life at Sea) would conflict with ADA requirements. The Department would structure any regulatory requirements to avoid such conflicts.